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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 595

MRS. FANNIE E. LANG, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1933

CERTIORARI GRANTED FEBRUARY 6, 1933

(37,292)

(37,292)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 24, 1933

[fol. a-1] **BEFORE UNITED STATES BOARD OF TAX APPEALS**

Docket No. 43518

Mrs. Fannie E. Lang, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Appearances:

For petitioner: Washington Bowie, Jr., Esq.
For respondent: O. J. Tall, Esq.

Docket Entries

1929.
Apr. 6. Petition received and filed. Taxpayer notified. (Fee paid.)
Apr. 8. Copy of petition served on General Counsel.
May 22. Answer filed by General Counsel.
May 29. Copy of answer served on taxpayer—General Calendar.

1930.
Aug. 21. Hearing set Nov. 5, 1930.
Oct. 31. Motion for continuance of 60 days filed by taxpayer. Nov. 1, 1930 granted to 12/1/30.
Dec. 1. Hearing had before Mr. Arundell on the merits. Briefs due Feb. 2, 1931. Written stipulation of facts filed.
Dec. 2. Amended answer filed by General Counsel.

1931.
Jan. 22. Transcript of hearing 12/1/30 filed.
Jan. 30. Brief filed by General Counsel.
Jan. 30. Brief filed by taxpayer.
Jan. 24. Findings of fact and opinion rendered—Mr. Arundell, Div. 7. Decision will be entered under Rule 50.

[fol. 2]
July 16. Notice of settlement filed by General Counsel.
July 18. Hearing set Aug. 5, 1931 on settlement.
July 31. Consent to settlement filed by taxpayer.
Aug. 7. Decision entered—Mr. Smith, Division 5.

1932.

Feb. 1. Supersedeas bond in the amount of $2,711.00 approved and ordered filed.

Feb. 1. Petition for review to U. S. Circuit Court of Appeals (4) with assignments of error filed by taxpayer.

Feb. 1. Proof of service filed.

Mar. 30. Praecipe with proof of service filed.

Mar. 31. Copy of order from Fourth Circuit Court of Appeals enlarging time for a period of ten days to prepare and deliver documents filed.

April 9. Order entered extending the time for transmission and delivery of the record to April 16, 1932.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed April 6, 1929

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT: AR: B-1: FMA-60D) dated February 6, 1929, and as a basis of her proceeding alleges as follows:

1. The petitioner is a widow residing at 118 Beaumont Avenue, Catonsville, Maryland.

2. The notice of deficiency (a copy of which is hereto attached and marked Exhibit A) was mailed to the petitioner on February 6, 1929.

[fol. 3] 3. The taxes in controversy are income taxes for the calendar year 1925, and for the entire sum stated in said notice, namely, Twelve Hundred and Thirty-two Dollars and Eighty-four Cents ($1,232.84).

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

First. The item of additional income alleged to be profit or gain from the sale of real estate is for the greater part, founded upon the sale of residence property known as

"Glen Alpine," and respondent is in error as to the correct basic-value in the hands of petitioner for income tax purposes, in that his computation is based upon a Bureau ruling which the petitioner contends is illogical, arbitrary, capricious and discriminatory, for the reason that it fails to give proper recognition to the circumstances and conditions under which the petitioner both acquired and sold the property, involving, among other things, the proceeds of sale actually received by petitioner after liquidation of mortgage indebtedness incurred by petitioner's husband prior to his decease.

Second. With respect to disallowances for interest and other deductions claimed by petitioner in her tax return, respondent is in error as to the facts and figures underlying said deductions, and his conclusions as to what part had accrued prior to the death of petitioner's husband are, likewise, erroneous.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The residence property known as "Glen Alpine" was originally purchased in 1915 at a cost of $13,000 and, at the direction of petitioner's husband, the deed thereto vested the title in Walter B. Lang and Fannie E. Lang, his Wife, as tenants by the entireties. Of the cost price, petitioner contributed $1,560 (12%) from her personal funds, and the balance was paid by the husband out of his personal funds. Permanent improvements were made at a cost of $1,500 all of which was paid by the husband personally. Some years later the husband borrowed $20,000 for his own use and purposes, in no manner related to this [fol. 4] residence, but secured said loan by a mortgage on said residence. At the time of the husband's death in 1924 this residence had a market value of $40,000 against which there remained an unpaid balance of $18,672.50 under the mortgage, and in compliance with the requirements of the Revenue Act of 1924 this property was duly included in arriving at value of the husband's net estate for purposes of the Federal Estate Tax. After her husband's death the petitioner made payments on this mortgage loan and had reduced the balance to $17,675.00 when she sold the residence on or about July 1, 1925 for $40,000

from which said sum of $17,675 was withheld, leaving $22,325 as the saleprice received by the petitioner.

(b) Of the expenses connected with the sale of a tract known as "Rollingside" (ignored by the respondent in his computations), $2,630.48 was the amount of commissions accrued at the date of death of petitioner's husband, and this amount was included in the liabilities of his estate. The balance of the expenses, amounting to $52.80, were incurred and paid by the petitioner personally.

(c) Of the total amount of interest paid by the petitioner in 1925, only $2,864.52 had accrued prior to her husband's death, and this amount was included in the liabilities of his estate.

(d) Of the total amount of taxes paid by the petitioner in 1925, $761.96 had accrued prior to her husband's death, and this amount was included in the liabilities of his estate.

(e) The deduction of $2,416.50 claimed by the petitioner in her tax return and disallowed by the respondent, has no relation to the sale of the residence property. Nevertheless, it represented accrued expenses included among the liabilities of the husband's estate and paid by the petitioner in 1925.

Wherefore the petitioner prays that this Board may hear the proceeding; that a redetermination of the deficiency (if any) be made in accordance with the contentions [fol. 5] of the petitioner and the facts herein presented; and for such other and general relief as this Board may deem proper and equitable.

(S.) Washington Bowie, Jr., Counsel for Petitioner.
Washington Bowie, Jr., 616 Fidelity Bldg., Baltimore, Md.

Duly sworn to by Fannie E. Lang. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

(1)

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Feb. 6, 1929.

Address reply to Commissioner of Internal Revenue and refer to ——.

[fol. 6] Mrs. Fannie E. Lang, 36 Melvin Avenue, Catonsville, Maryland.

MADAM: In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the year 1925 discloses a deficiency of $1,232.84, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiencies.

Respectfully, D. H. Blair, Commissioner, by (Signed) C. B. Allen, Deputy Commissioner.

Enclosures: Statement, Form 866, Form 882.

[fol. 7] Exhibit A

(2)

Statement

IT:AR:B-1. FMA-60D

Feb. 6, 1929.

In re Mrs. Fannie E. Lang, 36 Melvin Avenue, Catonsville, Maryland

Tax Liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1925	$1,232.84	None	$1,232.84

The report of the Internal Revenue Agent in Charge at Baltimore, Maryland, covering the verification of your income tax return for the year 1925, has been reviewed and approved by this office as submitted disclosing the following adjustments:

Loss disclosed by your return		$5,606.92
Add:		
1. Increase in profit from sale of real estate	$23,943.28	
2. Interest paid, decreased	3,583.71	
3. Deductions disallowed	2,416.50	
		29,943.49
Adjusted net income		$24,336.57
Less:		
Dividends	$166.68	
Personal exemption and credit for dependents	4,300.00	
		4,466.68
Income subject to normal tax		$19,869.89

[fol. 8] Computation of Tax

Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on 4,000.00		120.00
Normal tax at 5% on 11,869.89		593.49
Surtax on $24,336.57		463.56
Total Tax		$1,237.05
Less:		
Earned income credit	$2.63	
Tax paid at source	1.58	
		4.21
Tax liability shown on Form 866		$1,232.84

Exhibit A

(3)

Mrs. Fannie E. Lang, Statement

Brought forward	$1,232.84
Tax previously assessed	None
Proposed deficiency	$1,232.84

Explanation of Changes

1. This item represents the profit realized by you on the sale of a residence acquired in 1915 by you and your husband in entirety. In determining this profit, the cost of the property in 1915 has been used in accordance with Income Tax Ruling #1635 reported in Internal Revenue Cumulative Bulletin II-1, Page 19. Details of this transaction are fully set forth in the revenue agent's report, a copy of which was furnished you.

2. Interest in the amount of $3,583.71 accrued to the date of your decedent husband's death has been disallowed as a deduction from your gross income.

3. This item is comprised of the amount of $392.75 expending for grading which has been disallowed for the reason that it is held to constitute a capital expense, and $2,023.75, advertising commissions, the latter being taken

[fol. 9] into consideration in determining the profit from the sale of the residence.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1925, the Bureau will be unable to afford you an opportunity under the provisions of Treasury Decision 3867 to discuss your case before mailing formal notice of its determination as provided by Section 274(a) of the Revenue Act of 1926. It is, therefore, necessary at this time, in order to protect the interests of the Government, to issue this formal notice of deficiency.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed May 22, 1929

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3.

4. First and Second. Denies the allegations of error contained in paragraphs 4. First and Second.

5. (a) to (e), inclusive. For lack of information sufficient to form a belief, denies the allegations contained in paragraphs 5 (a) to (e), inclusive.

[fol. 10] 6. Denies generally and specifically each and every allegation of the petition not hereinbefore admitted or denied.

Wherefore it is prayed that the appeal be denied.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Of counsel:
Hartford Allen, Hugh Brewster, Special Attorneys, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER—Filed Dec. 2, 1930

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, pursuant to a motion made at the hearing in the above-entitled case to amend his answer heretofore filed, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are Federal income taxes for the calendar year 1925 but denies that the [fol. 11] amount in controversy is the amount set forth in paragraph 3 of the petition.

4. Denies that the respondent erred in the determination of the deficiency as alleged in paragraph 4 of the petition.

5. Denies each and every allegation of fact contained in paragraph 5 of the petition.

6. Avers that the respondent in determining taxable net income for the year 1925, according to the notice of deficiency, allowed the sum of $2,500.00 for improvements to the property in question prior to its sale, whereas the improvements actually made cost only $1,500.00, and that taxable income according to the notice of deficiency should, therefore, be increased by the amount of $1,000.00 (paragraph 3 of the stipulation of facts filed at the hearing).

7. Avers that the respondent in determining the taxable net income for the year 1925, according to the notice of

deficiency, allowed a deduction for local taxes paid by the petitioner in 1925 in the amount of $1,431.93 and that such amount was excessive to the extent of $761.96, and that taxable net income as disclosed by the notice of deficiency should, therefore, be increased by $761.96 (paragraph 8 of the stipulation of facts filed at the hearing) (oral stipulation as to local taxes).

Wherefore it is prayed that petitioner's appeal be denied.
(Signed) C. M. Charest. C. M. Charest, General Counsel, Bureau of Internal Revenue.

Of counsel.
O. J. Tall, Special Attorney, Bureau of Internal Revenue.

amm.
12-2-30.

[fol. 12] 23 B. T. A., —

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 43518

MRS. FANNIE E. LANG, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated June 24, 1931

Findings of Fact and Opinion

Real estate acquired in 1915 by petitioner and her husband as tenants by the entirety was sold by the surviving widow in 1925. Held that the basis for determining gain on the sale is the cost of the property at the time of acquisition.

Washington Bowie, Esq., for the petitioner.
O. J. Tall, Esq., for the respondent.

Proceeding for the redetermination of a deficiency of $1,232.84 in income tax for 1925. The issues are whether

the basis for computing the profit realized or loss sustained on the sale by petitioner in 1925 of real estate acquired in 1915, and held with her husband as tenants by the entireties, should be (a) cost, or (b) market value at the time of her husband's death, and the proper amount allowable as a deduction for interest. By an amended answer respondent asks that the proposed deficiency be increased by reason of an excessive allowance for improvements made on the property sold, and local property taxes. The facts were stipulated.

Findings of Fact

In 1915 Walter B. Lang and his wife, the petitioner, purchased a piece of residential property in Catonsville, Maryland, at a cost of $13,000, of which amount the husband contributing $11,440 and the petitioner $1,560. Title [fol. 13] was taken by the purchasers as tenants by the entireties. Thereafter certain permanent improvements were made on the property at a cost of $1,500, all of which was paid by the husband.

Petitioner's husband died in 1924. The real estate then had a market value of $40,000. The petitioner was executrix and the sole beneficiary of his estate.

The real estate was included in the estate tax return filed by the petitioner, as executrix, at $35,200, this being 88 per cent of the value at the time of death, which percentage represents the portion of cost paid by the decedent. A Federal estate tax was paid based on the net estate as returned by the executrix.

The real estate was sold by petitioner on or about July 1, 1925, for $40,000. The selling expenses amounted to $2,055.80, which amount has been allowed by the respondent in determining the profit realized on the sale.

In 1925 petitioner paid and deducted in her return for that year, interest charges amounting to $6,298.49, of which the sum of $2,846.52 had accrued prior to her husband's death and was included in the liabilities of his estate. In that year she also paid, and claimed as a deduction in her return, the sum of $1,431.93 for local property taxes. Of this amount $761.96 had accrued prior to her husband's death, and was included among the liabilities of his estate.

In his determination of the deficiency respondent (a)

used cost in 1915 as a basis for computing the amount of profit realized on the sale of the real estate and in his computation allowed $2,500 for improvements to the real estate; (b) disallowed $3,583.71 of the interest deduction on the ground that such amount had accrued prior to the death of petitioner's husband, and (c) allowed the sum of $1,431.93 as a deduction for local property taxes.

OPINION

ARUNDELL:

Petitioner claims that, by reason of the property being held by the entireties, the basis for determining the taxable [fol. 14] gain on the sale is the sum of the cost contributed by her ($1,560) and the value of her husband's interest in it at the time of his death ($35,200) a total of $36,760. Respondent has used as a basis the cost in 1915 in the amount of $13,000.

The question here raised has been decided by the Board adversely to petitioner's contention in Elizabeth W. Boykin, 16 B. T. A. 477, but that was before Tyler v. United States, 281 U. S. 497, and at a time when the Board's position was that estates by the entirety might not be included in the gross estate for the imposition of an estate tax. Petitioner relies on the Tyler case, but, as we view that decision, it is not decisive of the question here presented. It is true that in that case the Supreme Court was not disposed to allow the fiction of the unity of husband and wife to stand in the way of the inclusion in the gross estate of an estate by the entirety to the extent and in the manner provided for in the statute. It was said in that case that, "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." The conclusion of the court was not that upon death the survivor takes by an outright transfer, as that word is commonly understood, but that death is the generating source of an enlargement of property rights which Congress might and did include within that class of happenings upon which an estate tax is imposed.

A part of petitioner's argument is that the survivor takes by inheritance. But this is not the law as we understand it. The rights of both husband and wife originate in the deed of conveyance. Under it each takes "not by

moieties, but the entirety." Ades v. Caplan, 132 Md. 66; 103 Atl. 94. The interest of the wife in the whole property under the deed during the lifetime of the husband is so much hers that it cannot be subjected to the debts of the husband. McCubbin v. Stafford, 85 Md. 378; 37 Atl. 214. The only effect of the death of one of the tenants is to remove the restrictions with which the ownership of the other was hedged about; it does not change the source of ownership, namely, the deed of conveyance. The Supreme Court in the Tyler case recognized the State law to be as we have [fol. 15] just stated it, and said, moreover, that those decisions were binding on it.

It is also argued that imposition of a tax on the sale of the property will result in double taxation because of the fact that the same property was included in the decedent's estate, and an estate tax paid. Discussing a similar argument in Ernest M. Bull, Executor, 7 B. T. A. 993, 1000, we said:

But there is no warrant for the assumption of mutual exclusion. The two taxes are different in kind and incidence, and if when properly applied they each produce revenue in respect of the same matter, that fact alone does not militate against either levy. Double tax is of course not to be presumed (see Nichols v. United States, Court of Claims, April 4, 1927; 6 Am. Fed. Tax. Rep. 6592) and ought to be avoided if doubtful, but if clear it is not invalid. This may be illustrated by the plain overlapping of the capital stock tax and the income tax. The former is measured by the actual value of capital stock. Such value frequently reflects earnings which at the same time measure the income tax. But the earnings when derived are not less subject to income tax because they have given taxable value to capital stock. A similar impinging of the inheritance tax and the income tax upon the same factor of value will be found in the two decisions of the Supreme Court in United States v. Fidelity Trust Co., 222 U. S. 158, and Irwin v. Gavit, 268 U. S. 161; 5 Am. Fed. Tax Rep. 5380.

Moreover, in the present case the two taxes fall on different persons; the estate tax on decedent's estate, and the income tax on the petitioner. If the argument of petitioner were sound, it would be equally sound to say that that portion of a man's income which he saves and which eventually becomes a part of his estate should not be subject to

an estate tax because he has once paid an income tax on it.

The primary basis for computing gain or loss is cost. In this case the cost of the property in which the petitioner "became seized of the entire estate" (Safe Deposit & Trust Co. v. Tait, 295 Fed. 429) was $13,000, and she sold it in [fol. 16] the taxable year for $40,000. We think it does not matter that a part of the cost was supplied by the other spouse. If it be considered that the part contributed by the deceased spouse was a gift, then the basis as to such part is the fair market value at the time of the gift. Section 204(a) (4) of the Revenue Act of 1924. As the property here was acquired for cash, the presumption is that the cash paid is the measure of such value.

Accordingly, we hold that the gain realized by petitioner on the sale of the property in 1925 was the difference between cost of $13,000 and selling price of $40,000, subject to adjustment for improvements as stipulated, which will be settled under Rule 50. The taxes and interest accrued at the time of decedent's death, and which were included as liabilities of his estate, are not proper deductions from petitioner's income, and this will be adjusted in the Rule 50. settlement.

Reviewed by the Board.

Decision will be entered under Rule 50.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 43518

MRS. FANNIE E. LANG, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Decision

Pursuant to findings of fact and opinion promulgated June 24, 1931, the respondent herein, to-wit, on July 16, 1931 having filed a proposed redetermination for the year 1925, and the petitioner on July 31, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

[fol. 17] Ordered and decided that there is a deficiency for the year 1925 in the amount of $1,355.81.

Enter.

Entered Aug. 7, 1931.

(Signed) Charles P. Smith, Member.

vlh.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW—Filed Feb. 1, 1932

Petition of Mrs. Fannie E. Lang for a Review by the United States Circuit Court of Appeals for the Fourth Circuit of a Decision by the United *United* Board of Tax Appeals, Determining a Deficiency for the Year 1925, in the amount of $1,355.81.

(Filed August 7th, 1931.)

Mrs. Fannie E. Lang, the petitioner in -his cause, by Washington Bowie, Jr., Counsel, hereby files her petition for review by the United States Circuit Court of Appeals for the Fourth Circuit of the decision of the United States Board of Tax Appeals rendered on August 7th, 1931, 23 B. T. A. 854, determining a deficiency in the petitioner's Federal income tax on account of the year 1925, in the amount of $1,355.81, and respectfully shows:

[fol. 18] I

The petitioner, Mrs. Fannie E. Lang, is a citizen of the State of Maryland, residing in Catonsville, Maryland.

II

Nature of the Controversy

The controversy involves the proper determination of the petitioner's liability for Federal income taxes for the calendar year 1925.

In 1915 Walter B. Lang and his wife, the petitioner, purchased a piece of residential property in Catonsville, Maryland, at a cost of $13,000, of which amount the husband con-

tributed $11,540 and the petitioner $1,560. Title was taken by the purchasers as tenants by the entireties. Thereafter certain permanent improvements were made on the property at a cost of $1,500, all of which was paid by the husband.

Petitioner's husband died in 1924. Said real estate then had a market value of $40,000.

Said real estate was included in the estate tax return filed by the petitioner as executrix at $35,200, this being 88% of the value at the time of death, which percentage represents the proportion of cost paid by the decedent. The Federal estate tax was paid, based on the net estate as returned by the executrix.

Said real estate was sold by the petitioner on or about July 1st, 1925, for $40,000. The selling expenses amounted to $2,055.80, which amount has been allowed by the respondent in determining the profit realized on the sale.

The Commissioner of Internal Revenue held that a profit accrued to the petitioner, arrived at by taking the difference between the cost price of said property when purchased by Walter B. Lang and the petitioner in 1915 and the price at which it was sold in 1925 and this determination was upheld by the United States Board of Tax Appeals.

[fol. 19]

III

The said Mrs. Fannie E. Lang being aggrieved by the finding of fact and conclusions of law contained in the said finding and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fourth Circuit.

IV

Assignments of Error

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The holding that the gain realized by petitioner on the sale of a piece of real estate; purchased in 1915 and held by petitioner and her husband as tenants by the entireties until said husband's death in 1924; was the difference be-

tween the cost of $13,000 and the selling price of $40,000, subject to adjustment for improvements as stipulated.

2. The failure to find that the basis for determining the taxable gain on the sale of said real estate held by petitioner and her husband as tenants by the entireties, is the sum of the cost contributed by petitioner towards its purchase and the value of her husband's interest in it at the time of his death.

3. The finding of a deficiency for the year 1925 in lieu of a determination that there was no income tax due from the petitioner for the year in controversy.

(Signed) Washington Bowie, Jr., Counsel for Petitioner, 616 Fidelity Building, Baltimore, Maryland.

Duly sworn to by Washington Bowie, Jr. Jurat omitted in printing.

[fol. 20] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 30, 1932

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

[fols. 21 & 22] (2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination

(b) Answer of the respondent

(c) Amended answer of the respondent

(3) The findings of fact and opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) This Præcipe.

(S.) Washington Bowie, Jr. Washington Bowie, Jr., Attorney for Petitioner.

Service of copy of the within Præcipe for Record is admitted this 30th day of March, 1932.

C. M. Charest, Attorney for Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 3302.

Mrs. Fannie E. Lang, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

April 14, 1932, the transcript of record is filed and the cause docketed.

Same day, certified copy of order extending the time for transmission and delivery of the record to April 16, 1932, is filed.

Same day, copy of order extending the time for the preparation of evidence and the transmission and delivery of the documents by the Clerk of the Board of Tax Appeals to the Clerk of this Court for a period of ten days is filed.

Same day, the appearance of Washington Bowie, Jr., is entered for the petitioner.

April 22, 1932, the appearance of G. A. Youngquist, Assistant Attorney General; Sewall Key, Special Assistant to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue, and O. J. Tall, Special Attorney, Bureau of Internal Revenue, is entered for the respondent.

April 29, 1932, twenty-five copies of the printed record are filed.

June 17, 1932, the appearance of Wm. Cutler Thompson, Special Assistant to the Attorney General, and J. Louis Monarch, Special Assistant to the Attorney General, is entered for the respondent.

ARGUMENT OF CAUSE.

June 24, 1932 (June term, 1932), cause came on to be heard before Northcott and Soper, Circuit Judges, and Watkins, District Judge, and is argued by counsel and submitted.

OPINION.

Filed October 3, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 3302.

Mrs. Fannie E. Lang, Petitioner,

versus

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

(Argued June 24, 1932. Decided October 3, 1932.)

Before NORTHCOTT and SOPER, Circuit Judges, and WATKINS, District Judge.

WASHINGTON BOWIE, JR., for Petitioner, and J. LOUIS MONARCH, Special Assistant to the Attorney General, (G. A. YOUNGQUIST, Assistant Attorney General; SEWALL KEY and WM. CUTLER THOMPSON, Special Assistants to the Attorney General; C. M. CHAREST, General Counsel, Bureau of Internal Revenue, and O. J. TALL, Special Attorney, Bureau of Internal Revenue, on brief) for Respondent.

NORTHCOTT, Circuit Judge:

This is a petition to review a decision of the United States Board of Tax Appeals (23 B. T. A. 854), affirming a determination of a deficiency in income tax, by the Commissioner of Internal Revenue, against the petitioner, for the year 1925, in the amount of $1,355.81.

In 1915, Walter B. Lang and his wife, the petitioner purchased a piece of residential property in Catonsville, Maryland, at a cost of $13,000, of which amount the husband contributed $11,440, and the petitioner, $1,560. Title was taken by the purchasers as tenants by the entireties. Thereafter certain permanent improvements were made on the property at a cost of $1,500, all of which was paid by the husband.

Petitioner's husband died in 1924. The real estate then had a market value of $40,000. The petitioner was executrix and the sole beneficiary of his estate.

Said real estate was included in the estate tax return filed by the petitioner, as executrix, at $35,200, this being 88 per cent of the value at the time of death, which percentage represents the portion of cost paid by the decedent. A federal estate tax was paid based on the net estate as returned by the executrix.

The real estate was sold by petitioner on or about July 1, 1925, for $40,000. The selling expenses amounted to $2,055.80, which amount has been allowed by the respondent in determining the profit realized on the sale.

In 1925, petitioner paid and deducted in her return for that year, interest charges amounting to $6,298.49, of which the sum of $2,846.52 had accrued prior to her husband's death, and was included in the liabilities of his estate. In that year she also paid, and claimed as a deduction in her return, the sum of $1,431.93 for local property tax. Of this amount, $761.96 had accrued prior

to her husband's death, and was included among the liabilities of his estate.

In his determination of the deficiency respondent (a) used cost in 1915 as a basis for computing the amount of profit realized on the sale of the real estate and in his computation allowed $2,500 for improvements to the real estate; (b) disallowed $3,583.71 of the interest deduction on the ground that such amount had accrued prior to the death of petitioner's husband, and (c) allowed the sum of $1,431.93 as a deduction for local property taxes.

Petitioner's contention is that in determining the deficiency the Commissioner went back to the time of the acquisition of the property and treated it, for income tax purposes, as though the husband had never had any rights therein at all, when the correct basis for determining the value of the property in question, for purposes of taxation, should have been the amount she contributed towards the purchase of the property in 1915 plus the value of her husband's interest in it at the time of his death.

The statutes and regulations involved are the following:

"Revenue Act of 1926, c. 27, 44 Stat. 9.

"Sec. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

"(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

"(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in

subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act;

* * * * *

"Sec. 213. * * *

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

"(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse * * * : PROVIDED further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

"Treasury Department Regulations 69:

"Art. 1591. Basis for determining gain or loss from sale.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 204 and articles 1592-1602. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

"(1) The cost of such property (or, in the case of such property as is described in paragraphs (1), (4), and (5) of section 204 (a) and articles 1592 and 1594, the basis therein provided), or

"(2) The fair market value of such property as of March 1, 1913, whichever is greater.

"What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. In determining the fair market value of stock in a corporation, due regard shall be given to the fair market value of the corporate assets on the basic date. In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

"Art. 1594. Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.—In computing the gain or loss from the sale or other disposition of property acquired by gift or by a transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property

at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth)—

"(a) Such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death; and

"(b) Such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death.

"In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 204 (b) and article 1591.

"In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired."

A study of the statutes and regulations, above set out, shows that in order to sustain the contention made on behalf of petitioner it must be concluded that, on the death of her husband in 1924, she acquired some interest in the property in question by "bequest, devise or inheritance" (Sec. 204a (5)). It is claimed that *United States* vs. *Tyler*, 33 Fed. (2) 724, decided by this court, and *Tyler* vs. *United States*, 281 U. S. 497, sustain the position that "something" passed to petitioner on the death of her husband that was in the nature of an "inheritance", and that consequently, the value of the property, in computing petitioner's profit for income tax pur-

poses, should be fixed as of the date of the husband's death.

Mr. Justice Sutherland said in *Tyler* vs. *United States, supra*:

"The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound. *Warburton* vs. *White*, 176 U. S. 484, 496."

In *Cunningham* vs. *Cunningham*, 158 Md. 372, the court says:

"That (the tenancy by the entireties) was an estate which vested in the plaintiff by virtue of the conveyance to her husband and herself prior to his death. The effect of the grant was to clothe each of them with the entire title subject to termination as to either by his or her death in the lifetime of the other spouse. *Marburg* vs. *Cole*, 49 Md. 411; *Jordan* vs. *Reynolds*, 105 Md. 288, 66 Atl. 37; *Frey* vs. *McGaw*, 127 Md. 23, 95 Atl. 960; *Ades* vs. *Caplin*, 132 Md. 66, 103 Atl. 94."

In discussing the statute that was involved in the case of *Tyler* vs. *United States, supra*, Mr. Justice Sutherland also said:

"Section 201 imposes the tax 'upon the transfer of the net estate'; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute."

The death duty held properly imposed in that case was only sustained because Congress expressly used the

words "tenant in (by) the entirety". In the statute here under consideration there is no such express use or enumeration of estates by the entirety, and it follows that if they cannot be regarded as "inheritances" the property in question, under the Maryland law, must be regarded for income tax purposes as being acquired by the petitioner at the time she and her husband purchased it, and valued as of that date and not as of the date of her husband's death.

In the Tyler case Mr. Justice Sutherland goes on to say:

* * * * *

"The question here, then, is not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

* * * * *

"To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect of tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which

it is a part, entirely appropriate as a means to that end. *Taft* vs. *Bowers*, 278 U. S. 470, 482."

Properly analyzed the decision of the Supreme Court in the Tyler case, in our opinion, supports the decision of the Board of Tax Appeals in the present case.

Congress, as is its right, has specifically designated the character of transfers to which the standard of value at the time of acquisition shall apply, and has omitted including estates by the entirety, while in the statute under consideration in the Tyler case it (Congress) expressly included such estates.

There is no merit in the contention made that the imposition of the tax here would result in double taxation. The two taxes differ in kind and incidence, and, as was said by the Board in its decision, "fall upon different persons; the estate tax on decedent's estate, and the income tax on the petitioner".

The legal fictions surrounding an estate by the entirety are unquestionably of value, and such estates once created should not be allowed to escape necessarily incident and proper burdens of taxation.

The decision of the Board of Tax Appeals is

Affirmed.

JUDGMENT.

Filed and Entered October 8, 1932.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 3302.

Mrs. Fannie E. Lang Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

THIS CAUSE came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals, in this cause, be, and the same is hereby affirmed.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

October 8, 1932.

On another day, to-wit, November 8, 1932, the mandate of this Court in this cause is issued and transmitted to the United States Board of Tax Appeals at Washington, D. C., in due form.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remains upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 20th day of December, A. D. 1932.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 6, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,292. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 595. Mrs. Fannie E. Lang, petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed January 4, 1933. File No. 37,292.

FILE COPY

FILED
JAN 4 1933
CHARLES ELMORE CROP
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 595

MRS. FANNIE E. LANG, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WASHINGTON BOWIE, JR.,
Counsel for Petitioner.

J. R. SHERROD,
Of Counsel.

The Daily Record Co. Print, Baltimore.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

MRS. FANNIE E. LANG, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITION.

Mrs. Fannie E. Lang, by her attorney, Washington Bowie, Jr., prays that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Fourth Circuit, entered on October 8th, 1932 (61 Fed. (2d) 280), affirming a decision of the United States Board of Tax Appeals (23 B. T. A. 854).

A.

STATEMENT.

This is a Federal income tax case. The question is—What is the basis upon which gain or loss is computed

when the surviving tenant of a tenancy by the entirety sells property formerly owned by such tenancy?

In 1915, Walter B. Lang and his wife, the petitioner herein, purchased realty in Catonsville, Maryland, at a cost of $13,000.00, of which the husband contributed $11,440.00, and your petitioner $1,560.00. Title was taken by them as tenants by the entirety. Of the total cost, the husband paid 88 per cent, and your petitioner paid 12 per cent.

The husband died in 1924, at which time the realty had a fair market value of $40,000.00. In the deceased husband's Federal estate tax return, the realty was reported as $35,200.00, being 88 per cent of the fair market value and a Federal estate tax was paid on that basis.

Your petitioner, as the surviving tenant, sold this realty in 1925 for $40,000.00, less selling expenses of $2,055.80, or a net sales price of $37,944.20. In computing the profit on said sale, the respondent herein used as a basis the cost of the property to the two tenants in 1915. Your petitioner claims that in computing the profit, the respondent should have used as a base the cost to your petitioner, plus the appreciated value of the husband's investment in 1924, the date of the husband's death, which appreciated value became part of the corpus of the husband's estate, or in other words—capital—and that capital or corpus can never be taxed as income under the Sixteenth Amendment to the Constitution of the United States.

Specification of Error to be Urged.

The Circuit Court of Appeals erred in holding that in computing the profit upon the sale by a surviving tenant of property formerly held by husband and wife as

tenants by the entirety, the basis for such computation should be the cost of such property, to the surviving and the deceased tenants, instead of the cost to the surviving tenant, plus the appreciated value of the husband's investment at the date of the deceased husband's death, which appreciated value was subjected to Federal estate taxes.

B.

REASONS FOR GRANTING THE WRIT.

(1) The decision of the Court below is in conflict with the principles laid down by this Court in Tyler vs. U. S., 281 U. S. 497, 74 L. Ed. 991, 8 A. F. T. R. 10912, subsequently explained in Phillips vs. Dime Trust & Safe Deposit Company, 284 U. S. 160; 10 A. F. T. R. 459. In the former case, the Court held that all the appreciation which had occurred or accrued on his share prior to one tenant's death could be subjected to the Federal estate tax, as part of the corpus of the deceased tenant's estate. The Commissioner in that case argued for the adoption of a practical rule of taxation law, as applied to tenancies by the entirety, and the Court adopted this construction. When it comes to the income tax side of the law, the Commissioner argues for the application of the strict common law principles governing property held as tenants by the entirety. His position is inconsistent and will result in great injustice.

(2) The decision of the Court below is contrary to the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner vs. Fletcher Savings & Trust Company, Executor, 59 Fed. (2d) 508, where it was held that in the case of a tenancy by the entirety, the surviving tenant took the interest in the realty which her husband held at the time of his death

by "inheritance" as that term was used in Section 204(a)(5) of the Revenue Act of 1924, and Section 303(a)(2) of the Revenue Act of 1924.

(3) Double taxation results from the decision of the Court below. Congress showed its intent to subject the value of property held by a tenancy by the entirety to estate tax, but no intention is revealed to tax as income values previously taxed as corpus or capital of an estate.

(4) The decision of the court below is in conflict with the long-established and recognized decision of the United States Court of Claims in the case of Nichols vs. U. S., 64 Ct. Cls. 241, 6 A. F. T. R. 6592, which established the principle that appreciation or values once subjected to an estate tax as part of the corpus of an estate cannot by legislative or administrative fiat be taxed as income.

(5) The decision of the court below is in error in failing to apply the express provisions of Section 204(a)(5) of the Revenue Act of 1926 which provides that the basis for computing gain or loss upon the sale of property, acquired by "inheritance" is the value of the property at the time inherited.

(6) The decision of the court below is also in conflict with the decision of this Honorable Court in the case of U. S. vs. Supplee-Biddle Hardware Company, 265 U. S. 189, 4 A. F. T. R. 3989, where it was held that the proceeds of life insurance policies which could be taxed under the estate tax act could not again be taxed as income when received by the estate or a beneficiary, because of the result in double taxation, and such construction should be avoided.

(7) The question involved herein is of great general interest because a large percentage of homes, farms, etc., in this country are held under tenancies by the entirety, and would be subjected to double taxation upon any sale.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3302, Mrs. Fannie E. Lang, Petitioner vs. Commissioner of Internal Revenue, Respondent, and that said judgment of the Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

FANNIE E. LANG,

By: WASHINGTON BOWIE, JR.,

Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No.....

MRS. FANNIE E. LANG, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals is reported in 61 Fed. (2nd) 280.

Also it is copied in the record at page 25.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is October 8th, 1932 (R. 33).

2. This is a case arising under the income tax laws and involves the construction of the statute relative

to estates by the entirety, which has not heretofore been considered by this Court.

Petitioner contended that a deficiency in income tax assessed against her for the year 1925 in the amount of $1,355.81 was in error, in that certain real estate sold by her in 1925 having been acquired by her and her husband in 1915 as tenants by the entireties, the correct basis for determination of gain or loss on such sale is the value of the interest of her husband therein which was transferred to her at the time of his death in 1924 plus the cost of her interest therein at the time of the purchase (R. 13). The Circuit Court of Appeals denied this claim (R. 31).

Petitioner further contended that her husband, the other tenant by the entirety, died possessed of a definite financial interest in the real estate, which interest was transmitted by operation of law to her as the surviving tenant by the entirety. That this interest constituted a definite part of the corpus of his estate for the purpose of the Federal estate tax and was made the subject of said tax. That the inclusion of this interest in the decedent's taxable estate fixed both its status and value as an interest transmitted at or by reason of death, and that this transmission was by way of bequest, devise or inheritance within the meaning of the statute (R. 14). The Circuit Court of Appeals denied this claim (R. 29).

3. The jurisdiction of this Court is invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

III.

Statement of the Case.

Petitioner and her husband purchased a piece of real estate in 1915. Petitioner contributed 12% of the purchase price and her husband contributed 88%. Title to the property was taken by them as tenants by the entirety (R. 12). The husband died in 1924. Petitioner was executrix of his will and sole beneficiary thereunder (R. 13). This real estate was included in the estate tax return and a Federal estate tax, based upon the value of the husband's interest in said real estate at the time of his death, was paid (R. 13). This real estate was sold in 1925 by the petitioner for the same sum as it was appraised at in 1924 (R. 13). In making her income tax return for that year she treated 88% of the sale value of said real estate (the share of the purchase price contributed by her husband) as having been received by her at his death in 1924.

However, the Commissioner of Internal Revenue made a computation based upon the price paid in 1915 and its sale in 1925, disregarding altogether the fact of the death of the husband and the inclusion in his estate of the value of his interest in said property, at its then value, and the payment of the Federal estate tax thereon (R. 7, 8).

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in finding and holding that for income tax purposes, property must be deemed acquired by taxpayer when she and her husband purchased it as tenants by the entireties.

2. The Circuit Court of Appeals erred in finding and holding that within the meaning of the income tax law the

devolution of the property rights upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety, is not an acquisition by "bequest, devise or inheritance."

V.

ARGUMENT.

Summary of the Argument.

Point A.—The Decision Below is Contrary to and in Conflict with Prior Decisions of this Court and the Circuit Court of Appeals for the Seventh Circuit.

Point B.—The Statute Shows that it was the Intention of the Congress to Impose But One Tax Upon Each Increase in Value of Property and this Intention Should Be Given Effect.

POINT A.

The Decision Below Is Contrary To and In Conflict With Prior Decisions of This Court and the Circuit Court of Appeals for the Seventh Circuit.

The Statute involved is Section 204(a) of the Revenue Act of 1926, which provides:

> "Sec. 204(a). The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28th, 1913, shall be the cost of such property; except that * * *
>
> (5) If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision * * * (c) or (f) of Section 302 of the Revenue Act of 1924, or in subdivision (c)

or (f) of Section 302 of this Act." U. S. C. A., Title 26, Sec. 935.

The estate tax provisions of the statute and the regulations are set out in full in the opinion of the Court below (R. 26) and in the interest of brevity are not repeated here.

Section 302 of the Act above referred to is a part of the estate tax provisions of the statute and subdivisions (c) and (f) refer to transfers in trust or otherwise *causa mortis*, and property passing under a general power of appointment exercised by the decedent respectively.

Subdivision (e) of said section (302) provides for the imposition of the estate tax on tenancies by the entirety and the property here involved was taxed thereunder upon the death of the husband to the extent of 88% of its appraised value, that 88% being the interest of the husband therein.

In *Tyler v. United States*, 281 U. S. 497; 8 A. F. T. R. 10912:

this Court construed the Act of 1916 as to the estate tax upon property held as tenants by the entirety, the provisions of which—Sec. 202(c)—are identical with the provisions of the 1926 Act—Sec. 302(e). There this Court, in upholding the constitutionality of the estate tax upon the interest of the deceased tenant by the entirety said that the amiable fiction of the common law by which husband and wife are but one person and therefore upon the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other, seems unsubstantial when applied to a taxing act. That actual results rather than artificial rules should govern. It is then held (p. 504):

> "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In *Phillips v. Dime Trust & Safe Deposit Co.*, 284 U. S. 160; 10 A. F. T. R. 459:

this Court said that the Tyler case held that the "tax imposed under Sec. 202(c) Revenue Act of 1916, was a valid indirect tax, measured by the value of the property, *rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.*" (Italics supplied.)

In the case at bar the Circuit Court of Appeals distinguishes it from the Tyler case on the ground that, for estate tax purposes the Congress has expressly enumerated estates by the entirety, but that in the income tax portion of the statute, the Congress has omitted to enumerate estates by the entirety in designating the character of transfers to which the standard of value at the time of acquisition shall apply, saying:

> "In the statute here under consideration there is no such express enumeration of estates by the entirety, and it follows that, *if* they cannot be regarded as 'inheritances' the property in question, under the Maryland law, must be regarded for income tax purposes as being acquired by the petitioner at the time she and her husband purchased it, and valued as of that date and not as of the date of her husband's death." (R. 31.)

That Court does not discuss whether or not the devolution of these property rights upon the surviving tenant can be regarded as "inheritances" but, by affirming the decision of the Board of Tax Appeals, it necessarily holds that they cannot be.

In the case at bar the husband devised his entire estate to his wife (R. 13).

In *Commissioner v. Fletcher Savings and Trust Co., Executor,* 59 Fed. (2nd) 508:

the Circuit Court of Appeals for the 7th Circuit held that in a case of tenancy by the entireties the wife took the interest in the realty which her husband held at the time of his death by "inheritance" as that word may be fairly construed.

In that case, as in the case at bar, the sole issue was as to how the wife acquired the interest in the realty which her husband had at the time of his death. In both cases the title to the property was, during the lives of both spouses, held as tenants by the entirety. In both cases the statutes exempted from the computation in arriving at the tax to be imposed property acquired by "bequest, devise or inheritance" and in both cases the wife was the sole beneficiary under her husband's will.

It is inconceivable that the Congress, when it used the generic term, "bequest, devise or inheritance" in Section 204(a) of the statute, did *not* intend it to embrace the interest which devolves upon the surviving tenant upon the happening of an event—the death of the other tenant by the entirety—but that when it used the same term, "bequest, devise or inheritance" in Section 303(a)(2) of the same statute it *did* intend to embrace the same interest.

This in an important question of federal law, upon which two Circuit Courts of Appeal have reached opposite conclusions, and which has not been but should be settled by this Court.

The effect of the decision of this Court in the Tyler case (281 U. S. 497) is that for Internal Revenue Tax purposes, the "amiable fictions of the common law" as to tenancies by the entirety are to be disregarded and the devolution of property is to be looked at from a practical standpoint. The acquisition of rights in real estate, upon the death of the owner of these rights, would seem to be, from a practical viewpoint an acquisition by inheritance.

It is a forced and unnecessary construction to hold that the Congress intended that these rights of property should be recognized up to the moment of transfer to and acquisition by the surviving tenant for the purpose of taxing, then *eo instante* they should pass out of existence forever.

POINT B.

The Statute Shows That It Was the Intention of the Congress To Impose But One Tax Upon Each Increase in Value of Property and This Intention Should Be Given Effect.

The terms, "by purchase, gift, bequest, devise or inheritance" would seem to embrace all of the means or channels through which property is acquired and it must be assumed that the Congress, when it used these terms, intended to embrace all of the channels through which property can be acquired.

These terms are used alike in the statute in both the estate tax and income tax provisions.

Granting that the estate tax provisions "are a part of the general plan to prevent avoidance of taxation," consistency requires that the very principles, upon which the prevention of such avoidance rests, should be recognized

and adhered to when subsequently dealing with the same interests and their values in relation to the surviving spouse whose interest in the property was affected by the adoption of such principles.

The Congress having in mind the fact that property could escape bearing its just proportion of death duties, if the title was held as joint tenant or tenants by the entirety, took the precaution in enumerating the sources of death duties to specifically mention the interest of the deceased in property held jointly or by the entirety in framing the estate tax law. The rule of property therein set up in respect to all joint tenancies (including tenancies by the entireties) is that the joint interest is divided into parts, in the proportion of the respective financial interests of the co-tenants, according to their percentage of contribution to the cost of the property. That is, the statute looks upon the co-tenants as though they were tenants in common with the right of survivorship. This rule of property—an artificial one to be sure, but a rule nevertheless—set up and applied for the purpose of practical taxation, is necessarily two-fold, in that it affects both the decedent and the survivor, because in defining the interest of the decedent and its value at his death, it also establishes the post mortem interest of the survivor and its value to her. It follows, therefore, that the interest which passed to the wife from her husband at his death had imparted to it, under this rule of property, the quasi-character of inheritance, and that it retains this character for the purpose of the income tax.

A transfer of property from an owner at death to a living person by operation of law, in common acceptance, is an inheritance.

In *U. S. v. Tyler,* 33 Fed. (2nd) 724 (C. C. A. 4th Cir.) it is said:

> "We see no reason why the casting of the entire estate upon the survivor, which takes place by operation of law in case of death of one of the tenants by entireties, cannot be made the basis of taxation as well as the casting of succession upon the heir, which takes place in the case of intestate succession. The surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other; and in both cases it comes by operation of law."

The word "inherit" is used in law "in contradistinction to acquire by will, * * * to receive by transmission in any way, have imparted to or conferred upon; acquire from any source."

In re: White's Estate, 84 Pac. 831-2; 42 Wash. 360.

"Inheritance" in its popular acceptation includes all the methods by which a child or relation takes property from another at his death except by devise, and includes as well succession as descent.

Adams v. Akerlund, 48 N. E. 454-7; 168 Ill. 632.

Where the word "inheritance" is used in a statute, it will be construed to mean "any property passing by death to those entitled to succeed." "Whatever is transmitted by descent or succession."

Glascott v. Bragg, 87 N. W. 853; 111 Wis. 605.

The Circuit Court of Appeals for the 7th Circuit has reached the conclusion that the transfer of these interests from the husband to the surviving wife comes to her by way of inheritance.

In *Commissioner v. Fletcher Svgs. Bank & Trust Co., Excr.*, 59 Fed. (2nd) 508:

the only difference in facts is that there the deduction had been made by the executor of the formerly surviving spouse in its estate tax return, while here the sale was made by the surviving spouse. There, after stating that the right to deduct depended upon whether the transfer of that interest to the surviving spouse from her husband's estate came by way of gift, bequest, devise or inheritance, the Court said:

> "We think the word 'inheritance' may be fairly construed to include this transfer, and we are convinced that Congress so intended it. While in legal parlance we generally regard the meaning of the word 'inheritance' as the acquisition of property by one person as heir to another, yet it also means the act of possessing, receiving, obtaining, or succeeding to. The right to receive the entire property upon her husband's death came from the deed which created the estate by the entirety. The transfer to her of the interest therein which her husband had at the time of his death, and which transfer was necessary for her to completely hold and enjoy that right which the deed had given her, came from her husband's estate. She succeeded to her husband's right. She received and obtained and came into possession of it, and in that sense we think she must be considered as having inherited it from her husband's estate."

The inclusion of special interests as corpus of an estate, for Estate Tax purposes, fixes their status in the hands of the decedent and they become and remain corpus as to income tax procedure. No part of their value so fixed as corpus can become gain or income in the hands of a fiduciary or any beneficiary or distributee of said estate, as the result of realizing on them through subsequent sale. Only the excess realized above that corpus value would constitute income or gain.

Nichols vs. U. S. 64 Ct. Cl. 241 (6 A. F. T. R. 6592).

In *U. S. v. Supplee-Biddle Co.*, 265 U. S. 196, 4 A. F. T. R. 3989:

this Honorable Court said (with reference to life insurance policies):

> "Assuming, without deciding, that Congress could call the proceeds of such indemnity income, and validly tax it as such, we think * * * such a purpose on its part should be express, as it certainly is not here. * * * The result of the construction put by the government upon Secs. * * * would be to impose a double tax on the proceeds of the two policies in this case * * * i. e. an income tax and an estate tax. Such a duplication, even in an exigent war-tax measure, is to be avoided unless required by express words."

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment of the Circuit Court of Appeals for the Fourth Circuit, entered on the 8th day of October, 1932, may be reversed by this Honorable Court and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

WASHINGTON BOWIE, JR.,
Counsel for Petitioner.

J. R. SHERROD,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 595.

MRS. FANNIE E. LANG, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR THE PETITIONER.

J. R. SHERROD,

WASHINGTON BOWIE, JR.,

Counsel for Petitioner.

MILLER & CHEVALIER,

Of Counsel.

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MRS. FANNIE E. LANG, Petitioner,

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COMMISSIONER OF INTERNAL REVENUE.

BRIEF FOR THE PETITIONER.

I.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 61 Fed. (2nd) 280 (R. 20-28).

The opinion of the Board of Tax Appeals is reported in 23 B. T. A. 854 (R. 10-14).

II.

JURISDICTION.

1. The date of the judgment to be reviewed is October 8, 1932 (R. 29).

2. A petition for writ of certiorari was filed January 4, 1933, and was granted by this Court on February 6, 1933 (R. 31).

3. This is a case arising under the income tax laws and involves the construction of the statute relative to estates by the entirety, which has not heretofore been considered by this Court.

4. Petitioner and her husband purchased a piece of real estate in 1915. Petitioner contributed 12% of the purchase price and her husband contributed 88%. Title to the property was taken by them as tenants by the entirety (R. 11). The husband died in 1924. Petitioner was executrix of his will and sole beneficiary thereunder (R. 11). This real estate was included in the estate tax return and a Federal estate tax, based upon the value of the husband's interest in said real estate at the time of his death, was paid (R. 11). This real estate was sold in 1925 by the petitioner for the same sum as it was appraised at in 1924 (R. 11). In making her income tax return for that year she treated 88% of the sale value of said real estate (the share of the purchase price contributed by her husband) as having been received by her at his death in 1924.

However, the Commissioner of Internal Revenue made a computation based upon the price paid in 1915 and its sale in 1925, disregarding altogether the fact of the death of the husband and the inclusion in his estate of the value of his interest in said property, at its then value, and the payment of the Federal estate tax thereon (R. 6, 7).

5. The jurisdiction of this Court is invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347).

III.

QUESTIONS PRESENTED.

Petitioner contends that a deficiency in income tax assessed against her for the year 1925 in the amount of $1,355.81 was in error, in that certain real estate sold by her in 1925 having been acquired by her and her husband in 1915 as tenants by the entireties, the correct basis for determination of gain or loss on such sale is the value of the interest of her husband therein which was transferred to her at the time of his death in 1924 plus the cost of her interest therein at the time of the purchase (R. 12). The Circuit Court of Appeals denied this claim (R. 27).

Petitioner further contends that her husband, the other tenant by the entirety, died possessed of a definite financial interest in the real estate, which interest was transmitted by operation of law to her as the surviving tenant by the entirety. That this interest constituted a definite part of the corpus of his estate for the purpose of the Federal estate tax and was made the subject of said tax. That the inclusion of this interest in the decedent's taxable estate fixed both its status and value as an interest transmitted at or by reason of death, and that this transmission was by way of bequest, devise or inheritance within the meaning of the statute (R. 12). The Circuit Court of Appeals denied this claim (R. 25).

Petitioner further contends that the inclusion of a special interest in property as corpus of an estate for estate tax purposes fixes its status in the hands of the decedent and that it becomes and remains corpus as to income tax procedure. No part of its value so fixed as corpus can become gain or income in the hands of a fiduciary or any beneficiary or distributee of said estate

as the result of realizing on it through subsequent sale. Only the excess realized above that corpus value would constitute income or gain.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that for income tax purposes, property must be deemed acquired by taxpayer when she and her husband purchased it as tenants by the entireties.

2. The Circuit Court of Appeals erred in finding and holding that within the meaning of the income tax law the devolution of the property rights upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety, is not an acquisition by "bequest, devise or inheritance."

3. The Circuit Court of Appeals erred in refusing to hold that the inclusion of the interest of the husband in this real estate in his estate for estate tax purposes fixed its status as corpus and that it became and remained corpus as to income tax procedure, and that no part of its value so fixed as corpus could become gain or income as the result of realizing on it through subsequent sale, but that only the excess realized above that corpus value would constitute income or gain.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A.

The decision below is contrary to and in conflict with prior decisions of this court and the Circuit Court of Appeals for the Seventh Circuit.

POINT B.

The statute shows that it was the intention of the Congress to impose but one tax upon each increase in value of property and this intention should be given effect.

POINT C.

The interest of the husband in property held as a cotenant by the entirety having been cast upon the surviving tenant by operation of law at his death and having been ascertained and taxed as a part of his estate, said interest became corpus and is not subject to taxation under the income tax law. Only the excess realized above that corpus value is income.

POINT A.

THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The statute involved is Section 204(a) of the Revenue Act of 1926, which provides:

> "Sec. 204(a). The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28th, 1913, shall be the cost of such property; except that * * *.
>
> (5) If the property was acquired by bequest, devise or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision * * * (c) or (f) of Section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of Section 302 of this Act." U. S. C. A., Title 26, Sec. 935.

The estate tax provisions of the Statute and the regulations are set out in full in the opinion of the Court below (R.23) and in the interest of brevity are not repeated here.

Section 302 of the Act above referred to is a part of the estate tax provisions of the statute and subdivisions (c) and (f) refer to transfers in trust or otherwise *causa mortis*, and property passing under a general power of appointment exercised by the decedent, respectively.

Subdivision (e) of said section (302) provides for the imposition of the estate tax on tenancies by the entirety and the property here involved was taxed thereunder upon the death of the husband to the extent of 88% of its appraised value, that 88% being the interest of the husband therein.

In Tyler v. United States, 281 U. S. 497; 8 A. F. T. R. 10912: this Court construed the Act of 1916 as to the estate tax upon property held as tenants by the entirety, the provisions of which—Sec. 202(c)—are identical with the provisions of the 1926 Act—Sec. 302(e). There, this Court, in upholding the constitutionality of the estate tax upon the interest of the deceased tenant by the entirety said that the amiable fiction of the common law by which husband and wife are but one person and therefore upon the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other, seems unsubstantial when applied to a taxing act. That actual results rather than artificial rules should govern. It is then held (p. 504):

> "Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other."

In Phillips v. Dime Trust & Safe Deposit Co., 284 U. S. 160; 10 A. F. T. R. 459: this Court said that the Tyler case held that the "tax imposed under Sec. 202(c) Revenue Act of 1916, was a valid indirect tax, measured by the value of the property, *rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety.*" (Italics supplied.)

In the case at bar the Circuit Court of Appeals distinguishes it from the Tyler case on the ground that, for estate tax purposes the Congress has expressly enumerated estates by the entirety, but that in the income tax portion of the statute, the Congress has omitted to enumerate estates by the entirety in designating the character of transfers to which the standard of value at the time of acquisition shall apply, saying:

> "In the statute here under consideration there is no such express use or enumeration of estates by the entirety, and it follows that, *if* they cannot be regarded as 'inheritances' the property in question, under the Maryland law, must be regarded for income tax purposes as being acquired by the petitioner at the time she and her husband purchased it, and valued as of that date and not as of the date of her husband's death." (R. 27.)

That Court does not discuss whether or not the devolution of these property rights upon the surviving tenant can be regarded as "inheritances" but, by affirming the decision of the Board of Tax Appeals, it necessarily holds that they cannot be.

In the case at bar the husband devised his entire estate to his wife (R.11).

In Commissioner v. Fletcher Savings and Trust Co., Executor, 59 Fed. (2nd) 508: the Circuit Court of Appeals for the 7th Circuit held that in a case of tenancy by the entireties the wife took the interest in the realty which her husband held at the time of his death by "inheritance" as that word may be fairly construed.

In that case, as in the case at bar, the sole issue was as to how the wife acquired the interest in the realty which her husband had at the time of his death. In both cases the title to the property was, during the lives of both spouses, held as tenants by the entirety. In both cases the statutes exempted from the computation in arriving at the tax to be imposed property acquired by "bequest, devise or inheritance" and in both cases the wife was the sole beneficiary under her husband's will.

It is inconceivable that the Congress, when it used the generic term, "bequest, devise or inheritance" in Section 204(a) of the statute, did *not* intend it to embrace the interest which devolves upon the surviving tenant upon the happening of an event—the death of the other tenant by the entirety—but that when it used the same term, "bequest, devise or inheritance" in Section 303(a) (2) of the same statute it *did* intend to embrace the same interest.

This is an important question of Federal law, upon which two Circuit Courts of Appeal have reached opposite conclusions, and which has not been but should be settled by this Court.

The effect of the decision of this Court in the Tyler case (281 U. S. 497) is that for Internal Revenue Tax purposes, the "amiable fictions of the common law" as to tenancies by the entirety are to be disregarded and the devolution of property is to be looked at from a practical standpoint. The acquisition of rights in real estate, upon

the death of the owner of these rights, would seem to be, from a practical viewpoint an acquisition by inheritance.

It is a forced and unnecessary construction to hold that the Congress intended that these rights of property should be recognized up to the moment of transfer to and acquisition by the surviving tenant for the purpose of taxing, then *eo instanti* they should pass out of existence forever.

The estate tax part of the statute is borrowed from the English "Death duties" and "Succession duty" acts of Parliament.

Knowlton vs. Moore, 178 U. S. 41-52.

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties."

ibid P. 57.

> "Of course, they (death duties) concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

ibid P. 78.

POINT B.

THE STATUTE SHOWS THAT IT WAS THE INTENTION OF THE CONGRESS TO IMPOSE BUT ONE TAX UPON EACH INCREASE IN VALUE OF PROPERTY AND THIS INTENTION SHOULD BE GIVEN EFFECT.

The terms, "by purchase, gift, bequest, devise or inheritance" would seem to embrace all of the means or channels through which property is acquired and it must

be assumed that the Congress, when it used these terms, intended to embrace all of the channels through which property can be acquired.

These terms are used alike in the statute in both the estate tax and income tax provisions.

Granting that the estate tax provisions "are a part of the general plan to prevent avoidance of taxation," consistency requires that the very principles, upon which the prevention of such avoidance rests, should be recognized and adhered to when subsequently dealing with the same interests and their values in relation to the surviving spouse whose interest in the property was affected by the adoption of such principles.

The Congress having in mind the fact that property could escape bearing its just proportion of death duties, if the title was held as joint tenants or tenants by the entirety, took the precaution in enumerating the sources of death duties to specifically mention the interest of the deceased in property held jointly or by the entirety in framing the estate tax law. The rule of property therein set up in respect to all joint tenancies (including tenancies by the entireties) is that the joint interest is divided into parts, in the proportion of the respective financial interests of the co-tenants, according to their percentage of contribution to the cost of the property. That is, the statute looks upon the co-tenants as though they were tenants in common with the right of survivorship. This rule of property—an artificial one to be sure, but a rule nevertheless—set up and applied for the purpose of practical taxation, is necessarily two-fold, in that it affects both the decedent and the survivor, because in defining the interest of the decedent and its value at his death, it also establishes the post mortem interest of the

survivor and its value to her. It follows, therefore, that the interest which passed to the wife from her husband at his death had imparted to it, under this rule of property, the quasi-character of inheritance, and that it retains this character for the purpose of the income tax.

A transfer of property from an owner at death to a living person by operation of law, in common acceptance, is an inheritance.

In U. S. v. Tyler, 33 Fed. (2nd) 724 (C. C. A. 4th Cir.) it is said:

> "We see no reason why the casting of the entire estate upon the survivor, which takes place by operation of law in case of the death of one of the tenants by entireties, cannot be made the basis of taxation as well as the casting of succession upon the heir, which takes place in the case of intestate succession. The surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other; and in both cases it comes by operation of law."

"Inheritance" as used in a statute, will be construed to mean any property passing by death to those entitled to receive it, and includes whatever is transmitted by descent or succession.

Adams v. Akerlund, 168 Ill. 632; 48 N. E. 454-7;
Glascott v. Bragg, 111 Wis. 605; 87 N. W. 853;
In re: White's Estate, 42 Wash. 360; 84 Pac. 831-2.

The Circuit Court of Appeals for the 7th Circuit has reached the conclusion that the transfer of these interests from the husband to the surviving wife comes to her by way of inheritance.

In Commissioner v. Fletcher Svgs. & Trust Co., Exer., 59 Fed. (2nd) 508: the only difference in facts is that there the deduction had been made by the executor of the formerly surviving spouse in its estate tax return, while here the sale was made by the surviving spouse. There, after stating that the right to deduct depended upon whether the transfer of that interest to the surviving spouse from her husband's estate came by way of gift, bequest, devise or inheritance, the Court said:

> "We think the word 'inheritance' may be fairly construed to include this transfer, and we are convinced that Congress so intended it. While in legal parlance we generally regard the meaning of the word 'inheritance' as the acquisition of property by one person as heir to another, yet it also means the act of possessing, receiving, obtaining, or succeeding to. The right to receive the entire property upon her husband's death came from the deed which created the estate by the entirety. The transfer to her of the interest therein which her husband had at the time of his death, and which transfer was necessary for her to completely hold and enjoy that right which the deed had given her, came from her husband's estate. She succeeded to her husband's right. She received and obtained and came into possession of it, and in that sense we think she must be considered as having inherited it from her husband's estate."

The construction placed by the Court below upon the statute is to the effect that this interest is not transmitted by devise or inheritance. Therefore because the Congress has neither created a special term to describe this passing, nor described the interest in detail; this one method of acquiring property, be it called succession or something else, is to be singled out and set apart from all other known methods of acquiring property and thus made the subject of double taxation. In the instant case, if, instead of taking title as tenants by the entirety, the

conveyance had been to the husband and wife as tenants in common, there could be no question but that petitioner's contentions as to the method of determining the tax would be followed, but because of the language of the title deed, the result, according to respondent's contention, is that the increase in value over cost price shall be taxed twice, once to the estate and a second time to the petitioner. Such a construction is to be avoided, if possible.

Knowlton vs. Moore, 178 U. S. at P. 77.

POINT C.

THE INTEREST OF THE HUSBAND IN PROPERTY HELD AS A CO-TENANT BY THE ENTIRETY HAVING BEEN CAST UPON THE SURVIVING TENANT BY OPERATION OF LAW AT HIS DEATH AND HAVING BEEN ASCERTAINED AND TAXED AS A PART OF HIS ESTATE, SAID INTEREST BECAME CORPUS AND IS NOT SUBJECT TO TAXATION UNDER THE INCOME TAX LAW. ONLY THE EXCESS REALIZED ABOVE THAT CORPUS VALUE IS INCOME.

The inclusion of special interests as corpus of an estate, for Estate Tax purposes, fixes their status in the hands of the decedent and they become and remain corpus as to income tax procedure. No part of their value so fixed as corpus can become gain or income in the hands of a fiduciary or any beneficiary or distributee of said estate, as the result of realizing on them through subsequent sale. Only the excess realized above that corpus value would constitute income or gain.

Nichols v. U. S., 64 Ct. Cl. 241 (6 A. F. T. R. 6592).

In U. S. v. Supplee-Biddle Co., 265 U. S. 196, 4 A. F. T. R. 3989: this Honorable Court said (with reference to life insurance policies):

> "Assuming, without deciding, that Congress could call the proceeds of such indemnity, income, and

> validly tax it as such, we think * * * such a purpose on its part should be express, as it certainly is not here. * * * The result of the construction put by the government upon Secs. * * * would be to impose a double tax on the proceeds of the two policies in this case * * * i. e. an income tax and an estate tax. Such a duplication, even in an exigent war-tax measure, is to be avoided unless required by express words."

In Commissioner vs. Whitehouse, 38 Fed. (2nd) 162 (C. C. A. 1st Cir.), the attempt was made to tax an annuity for $5,000, provided for under the will of James Gordon Bennett. The question was whether the annuity was a gift or bequest or distributive income. In affirming the ruling of the Board of Tax Appeals that the annuity was a bequest and therefore not taxable as part of the annuitant's income, the Court said:

> "If material, we assume that all of the annuities were subject to the estate tax; so that to sustain the Commissioner's construction would involve double taxation—a result 'to be avoided unless required by express words' of a tax act."

The Estate Tax is not imposed upon the interest that ceases but on the interest that passes. If it were upon the interest that ceases, then life estates would be taxed to the estate of the life tenant. Therefore, while it might be argued that the interest of a spouse in property held as tenant by the entirety has many of the attributes of a life tenancy, this argument is of no force in view of the decision of this Honorable Court in Tyler vs. United States, 281 U. S. 497, holding that the death of one of the parties to the tenancy becomes the generating source of important and definite acquisitions to the property rights of the other. Therefore an estate tax having already been paid on an interest forming a part of the corpus of the decedent's estate, as required by statute, it

amounts to double taxation to attempt to tax any part of that same corpus value a second time under the guise of income in the hands of the recipient thereof.

If a definite property value is rightly part of the corpus of the estate of a decedent for estate tax purposes, it cannot, by any stretch of the imagination, become income to the person who comes into the enjoyment of that corpus value at and by reason of the decedent's death. Its status as corpus is definitely fixed by its appraisal and taxation under the estate tax. This value may earn income and the property itself may enhance in value and such enhancement becomes income when realized upon, but this corpus value itself is beyond the reach of the taxing power under income tax statutes.

CONCLUSION.

It is, therefore, respectfully submitted that the Circuit Court of Appeals for the Fourth Circuit erred in holding that in computing the profit upon the sale by the petitioner as surviving tenant of property held by petitioner and her husband as tenants by the entirety, the basis for such computation should be the cost of such property instead of the cost to the surviving tenant plus the appreciated value of the husband's investment at the date of his death, and therefore said decision should be reversed.

Respectfully submitted,

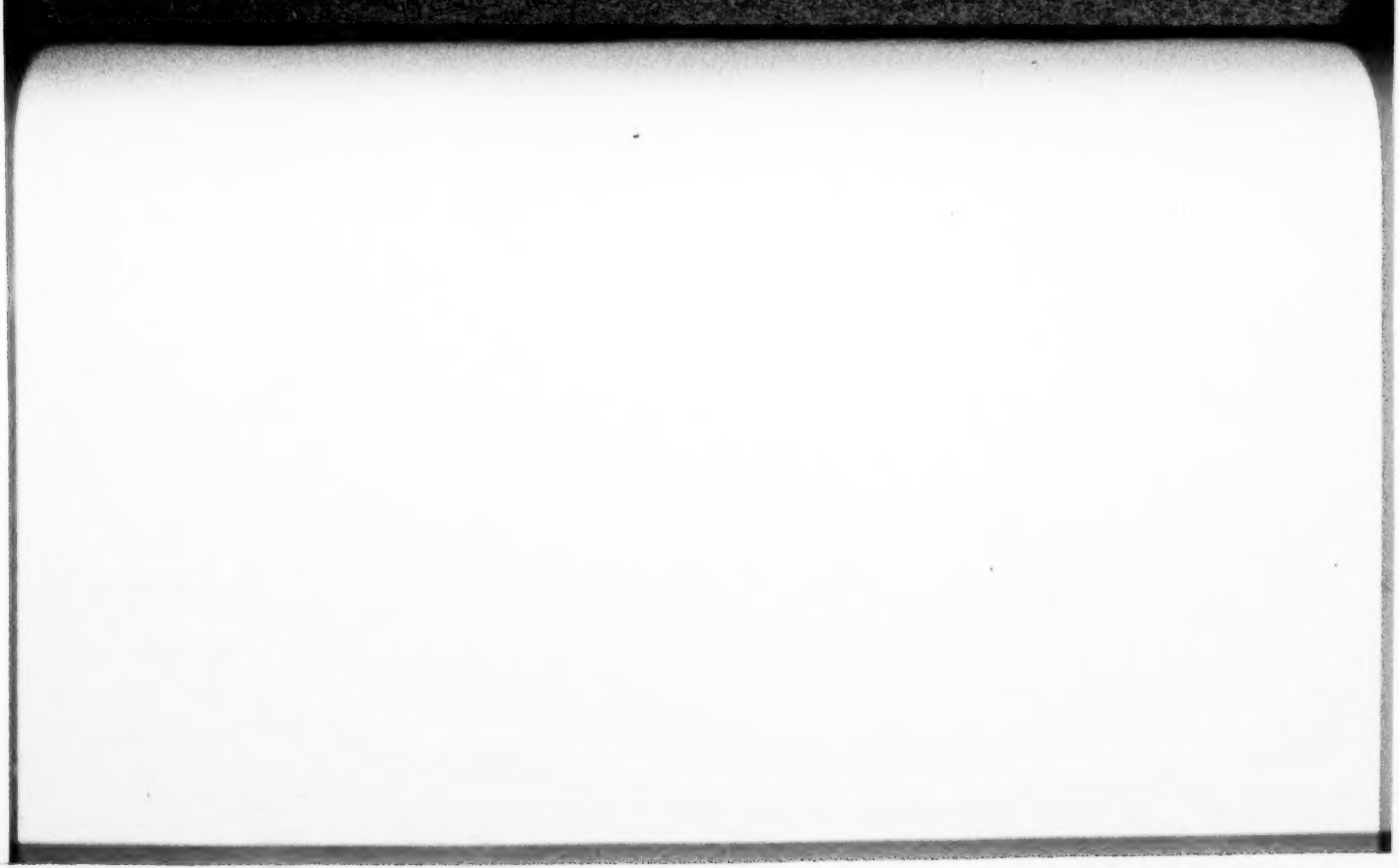
J. R. SHERROD,

WASHINGTON BOWIE, JR.,

Counsel for Petitioner.

MILLER & CHEVALIER,

Of Counsel.



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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 595

FANNIE E. LANG, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–16) is reported in 23 B. T. A. 854. The opinion of the Circuit Court of Appeals (R. 24–32) is reported in 61 F. (2d) 280.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 8, 1932. (R. 33.) Petition for writ of certiorari was filed January 4, 1933. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Real property acquired by petitioner and her husband as tenants by the entirety in 1915 was sold by petitioner as the surviving tenant in 1925, her husband having died in 1924. The question presented is whether the basis for determining the gain on the sale in 1925 is the original cost of the property or whether Section 204 (a) (5) of the Revenue Act of 1926 requires that the value of the property at the date of the husband's death should be taken into consideration.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–13.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 12–13), in so far as material to consideration of the present petition, may be summarized as follows:

In 1915 petitioner and her husband purchased certain residential property in Maryland at a cost of $13,000, of which amount petitioner contributed $1,560 and her husband the balance. Title was taken by the purchasers as tenants by the entirety. (R. 12, 13.) Certain permanent improvements, which cost $1,500, were paid for exclusively by peti-

tioner's husband. (R. 13.) In 1924 petitioner's husband died, leaving petitioner as executrix and sole beneficiary of his estate. The property held in the tenancy by the entirety then had a market value of $40,000. The real estate was included in the estate tax return filed by the petitioner as executrix, being valued at $35,200, or 88 per cent of the value at the time of the husband's death, which percentage represents the portion of the original cost paid by the decedent. (R. 13.) On or about July 1, 1925, petitioner sold the real estate for $40,000. In computing the profit realized on this transaction, petitioner deducted from the net sale price the amount she had contributed to the original purchase price in 1915, plus 88 per cent of the market value at the time of her husband's death. The Commissioner determined a deficiency in income tax by using the 1915 cost as the basis for computing the amount of profit realized on the sale. (R. 13.) The Commissioner's determination was reviewed by the Board and affirmed. (R. 16.) The court below affirmed the Board. (R. 33.)

ARGUMENT

Petitioner contends that the gain upon the sale of the property in 1925 should be measured not by the cost of the property in 1915, but by the sum contributed by her toward its purchase in 1915, plus the value of her husband's interest in the property at the time of his death.

The argument rests upon Section 204 (a) (5) of the Revenue Act of 1926, *infra*, which provides that if property "was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition * * *" and is founded upon the assumption that a tenant by the entirety acquires only a proportionate interest upon the creation of the estate, based upon the relation between his or her contribution and the total purchase price, the remainder of the estate being acquired by inheritance when the other tenant dies.

Section 204 (a) is part of the income tax title of the 1926 Act. It provides that the basis for determining the gain or loss from the sale of property acquired after February 28, 1913, shall be the cost of the property. Its various subsections deal with situations in which exceptions to this general rule may occur.

Section 204 (a) (5) specifies various methods by which property must be acquired to be within the exception. In addition to property acquired by "bequest devise, or inheritance," Section 204 (a) (5) is expressly made applicable to transfers made in contemplation of or intended to take effect at death and to property passing under a general power of appointment. In view of the specific references to acquisition of property by means other than "bequest, devise, or inheritance," it seems clear that Congress used those words in a technical

sense and not broadly, with the purpose of including therein property which by any possibility might be regarded as acquired through those methods. As Section 204 (a) (5) contains exceptions to the general provision, the presumption is that Congress stated all the exceptions it intended to state.[1] See *United States* v. *Scharton*, 285 U. S. 518, 521–522; *Bend* v. *Hoyt*, 13 Pet. 263, 272–273.

The omission from this section of estates by the entirety is merely a recognition that such estates vest in both spouses in their entirety when created, and that the gain upon their subsequent final disposition is to be determined as of that time.[2] Accordingly, the court below correctly held that Section 204 (a) (5) has no application to the pres-

[1] The committee reports accompanying the statutes in which the present section first appeared do not indicate that Congress intended that any unusual meaning should be attributed to the words "bequest, devise, or inheritance" in this section. See House Report No. 350 (67th Cong., 1st Sess.), p. 9; Senate Report No. 275 (67th Cong., 1st Sess.), p. 10; Senate Report No. 398 (68th Cong., 1st Sess.), p. 17.

[2] The decisions in Maryland, where the property involved in the present case was situated, establish a State rule of property entirely consistent with the common law concerning the character and incidents of estates by the entirety. Under those decisions the whole estate vests in the tenants as one person at the time the estate is created, regardless of the amount contributed by each respectively, and upon the death of either the entire estate belongs to the other, not by virtue of devise or inheritance, but by virtue of the title that vested under the original limitation. See *Cunningham* v. *Cunningham*, 158 Md. 372; *Ades* v. *Caplin*, 132 Md. 66; *Frey* v. *McGaw*, 127 Md. 23.

ent case, since it relates only to property acquired by "bequest, devise, or inheritance."

If the contrary view urged by petitioner were adopted, profits realized upon the sale of such property might in large measure escape the income tax. Grants of immunity from taxation are, however, strictly construed in favor of the sovereign. See *Pacific Co., Ltd.* v. *Johnson,* 285 U. S. 480, 491; *Parrott* v. *Commissioner,* 30 F. (2d) 792 (C. C. A. 9th), certiorari denied, 279 U. S. 870.

The Treasury Regulations interpreting the statutes defining gain or loss from a sale in connection with property acquired by bequest, devise, or inheritance, are in accord with our position. See Regulations 62, Arts. 1561, 1563; Regulations 65, Arts. 1591, 1594; Regulations 69, Arts. 1591, 1594, *infra.* And the same is true of the rulings of the Bureau, which are to the effect that the basis to be used in case of sale by the surviving spouse of property held by husband and wife as tenants by the entirety is the same as if the survivor alone had owned property from the date of its acquisition by husband and wife. See I. T. 1635, II–1 C. B. 19; G. C. M. 6677, VIII–2 C. B. 172. See also *Boykin* v. *Commissioner,* 16 B. T. A. 477; and see *Carpenter* v. *Commissioner,* 27 B. T. A. 282, which reaches a similar result under the but slightly different provisions of Section 113 (a) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818 (U. S. C. Sup. VI, Title 26, Sec. 113).

Petitioner contends, however, that the decision of the court below is in conflict with *Commissioner* v. *Fletcher Savings & Trust Co.*, 59 F. (2d) 508 (C. C. A. 7th). That case arose under Section 303 of the Revenue Act of 1924, *infra*, and involved the estate tax. That section provides that in computing the value of the net estate of the decedent there shall be deducted from the value of the gross estate "an amount equal to the value of any property * * * forming a part of the gross estate * * * of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest, devise, or inheritance * * *."

In the *Fletcher case* the question was whether one-half of the property going to the survivor of a tenancy by the entirety was received by such survivor as property received from the decedent by "inheritance." The court there held that the survivor had acquired the property by inheritance, which, under its view of the statute then under consideration, was not restricted in its meaning to the acquisition of property by one person as heir to another.

We submit that there is no conflict between the present case and *Commissioner* v. *Fletcher Savings & Trust Co., supra.* In the latter case the court stated at the outset (p. 509) that "The sole controversy in this appeal arises over the construction of

section 303 (a) (2) of the Revenue Act of 1924," which is a part of the estate tax title of the 1924 Act and deals with one of the authorized deductions for purposes of computing that tax. The court in the instant case was concerned with an entirely different provision in another portion of the tax laws. Section 204 (a) (5), as we have shown above, contains stated exceptions to a general revenue provision and is, therefore, to be strictly construed.

The mere fact that the courts have construed the same word appearing in two different statutes in two different ways does not create a conflict of decisions. As this Court said in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433:

> Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and the circumstances under which the language was employed.

Petitioner also contends that the imposition of the tax upon the sale of the property will result in double taxation, since an estate tax was levied in respect of the same interest. It is plain, however, that the two taxes are different in kind, and no objection can be sustained merely because they may

fall upon the same subject matter at different times and in different hands. See *Hellmich* v. *Hellman*, 276 U. S. 233; *Perthur Holding Corp.* v. *Commissioner*, 61 F. (2d) 785 (C. C. A. 2d); *Newman, Saunders & Co., Inc.* v. *United States*, 68 C. Cls. 641, certiorari denied, 281 U. S. 760.

CONCLUSION

The decision of the court below is correct. There seems to be no conflict of decisions and the petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
JOHN G. REMEY,
Special Assistants to the Attorney General.
WALTER GELLHORN,
Attorney.

JANUARY, 1933.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 14—

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act;

* * * * *

(U. S. C. App., Title 26, See 935.)

Revenue Act of 1924, c. 234, 43 Stat. 253, 305—

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(2) An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (B) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such prior decedent as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate and not deducted under paragraph (1) or (3) of this subdivision.

(U. S. C., Title 26, Sec. 1095.)

Treasury Regulations 69:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 204 and articles 1592–1602. The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

(1) The cost of such property (or, in the case of such property as is described in paragraphs (1), (4), and (5) of section 204 (a) and articles 1592 and 1594, the basis therein provided), or

(2) The fair market value of such property as of March 1, 1913, whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. In determining the fair market value of stock in a corporation, due regard shall be given to the fair market value of the corporate assets on the basic date. In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

ART. 1594. *Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.*— In computing the gain or loss from the sale or other disposition of property acquired by gift or by a transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (except in case of a bona fide sale for an adequate and full consideration in money or money's worth)—

(a) Such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of

or intended to take effect in possession or enjoyment at or after death; and

(b) Such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death.

In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 204 (b) and article 1591.

In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 595

MRS. FANNIE E. LANG, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–14) is reported in 23 B. T. A. 854. The opinion of the Circuit Court of Appeals (R. 21–28) is reported in 61 F. (2d) 280.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 8, 1932. (R. 29.) Petition for writ of certiorari was filed January 4, 1933, and the writ was granted February 6, 1933. (R.

31.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Real property acquired in 1915 by the petitioner and her husband as tenants by the entirety was sold by petitioner as the surviving tenant in 1925, her husband having died in 1924. The question presented is whether the basis for determining the gain on the sale is the cost of the property in 1915, as held by the court below, or the amount contributed to the purchase price by the petitioner in 1915 plus that portion of the value of the property at her husband's death which was included as part of his gross estate, as contended by the petitioner.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, pages 23–28, *infra*.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 11–12), in so far as material to consideration of the question presented, may be summarized as follows:

In 1915 petitioner and her husband purchased certain residential property in Maryland at a cost of $13,000, of which amount petitioner contributed $1,560 and her husband the balance. Title was taken by the purchasers as tenants by the entirety.

(R. 11.) Certain permanent improvements, which cost $1,500, were paid for exclusively by petitioner's husband. (R. 11.) In 1924 petitioner's husband died, leaving petitioner as executrix and sole beneficiary of his estate. The property held in the tenancy by the entirety then had a market value of $40,000. The real estate was included in the estate tax return filed by the petitioner as executrix at a value of $35,200, or 88 per cent of the value at the time of the husband's death, which percentage represents the portion of the original cost paid by the decedent. (R. 11.) On or about July 1, 1925, petitioner sold the real estate for $40,000. In computing the profit realized on this transaction, petitioner deducted from the net sale price the amount she had contributed to the original purchase price in 1915, plus 88 per cent of the market value at the time of her husband's death. In determining a deficiency in the petitioner's income taxes for the year 1925 the Commissioner used the 1915 cost as the basis for computing the amount of profit realized on the sale. (R. 11–12.) The Commissioner's determination in this respect was affirmed by the Board of Tax Appeals[1]. (R. 14.) The court below affirmed the Board. (R. 29.)

SUMMARY OF ARGUMENT

The sole question is one of statutory construction to determine whether, upon the sale of prop-

[1] The Commissioner and the Board allowed certain adjustments for selling expenses and cost of improvements, the amounts of which are not now in dispute. (R. 12, 14.)

erty by the survivor of a tenancy by the entirety, Congress intended to tax the whole of the gain realized upon the sale or only a part thereof. The general rule laid down by Section 204 (a) of the Revenue Act of 1926 is that the basis for determining gain or loss on a sale is the cost of the property. The exception contained in Section 204 (a) (5) relating to property acquired by bequest, devise or inheritance is not applicable here. The petitioner did not acquire the property within the general meaning of the word "inheritance" as heir to her husband, but rather by virtue of the original grant coupled with the fact of his death. Moreover, the fact that Congress deemed it necessary to specify transfers made in contemplation of or intended to take effect at death and property passing by power of appointment as being within the operation of Section 204 (a) (5) shows that the words "bequest, devise, or inheritance" were used in their technical sense and not broadly with the purpose of including property which by any possibility might be regarded as acquired through those methods. The Treasury regulations, Bureau rulings and decisions of the Board of Tax Appeals support our contention; no decision of this or other courts is opposed to it, and it is in keeping with the general policy of Congress to tax income to its full extent, in the hands of the recipient.

ARGUMENT

UNDER THE APPLICABLE STATUTE THE BASIS FOR DETERMINING THE TAXABLE GAIN WAS THE COST OF THE PROPERTY AT THE DATE OF PURCHASE

Petitioner and her husband purchased property at a total cost of $13,000 and petitioner, after her husband's death, sold the same property for $40,000. The difference between the two amounts plainly constitutes a realized gain or income, within the power of Congress to tax. The inquiry in this case is limited to the question whether Congress has evidenced an intention to lay an income tax upon the whole of the gain so realized or only upon a part, as contended by petitioner. We submit that an examination of the applicable provisions of the Revenue Act of 1926 shows a legislative intent to tax the whole of the gain, as the Board and the Circuit Court of Appeals held.

Section 204(a) of the Revenue Act of 1926, the material portions of which are contained in the Appendix (*infra,* p. 23), specifies the basis for determining gain or loss for income tax purposes on the sale of property acquired after February 28, 1913. It provides that the basis shall be the cost of the property, with certain exceptions set forth in subdivisions 1 to 11 of the section. The petitioner contends that the general rule that cost is the basis is not applicable here, but that the present case is governed by the exceptions contained in Section 204(a)(5) (*infra,* p. 23), providing that if the property was acquired by bequest,

devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

The contention is founded, we submit, on the fallacious assumption that upon the creation of the estate when the property was purchased in 1915, the petitioner as a tenant by the entirety acquired only a proportionate interest therein, based upon the relation between her contribution and the total purchase price, the remainder being acquired by inheritance when the other tenant died. If, as the petitioner suggests, she received from her husband at the date of his death a portion of the property measured by the husband's contribution to the original purchase price, it would follow that where the wife contributed no part of the purchase price at the time of the creation of the estate, she would acquire and hold no interest whatsoever therein during the life of her husband.

This theory is directly opposed both to the common law concerning the nature of estates by the entirety,[2] and to the decisions in Maryland, where the property was situated. The decisions of that State establish that each of the tenants is vested with title to the entire property from the time the estate is created, without regard to the contribu-

[2] See *United States* v. *Robertson*, 183 Fed. 711, 714 (C. C. A. 7th), certiorari denied, 220 U. S. 616; *Hamilton* v. *Fowler*, 99 Fed. 18, 26 (C. C. A. 6th), certiorari denied, 176 U. S. 685; *Garner* v. *Jones*, 52 Mo. 68, 71; *Thornton* v. *Thornton*, 3 Rand. (Va.) 179; *Beddingfield* v. *Estill & Newman*, 118 Tenn. 39; 2 *Thompson on Real Property*, Sec. 1735.

tions which each makes to the purchase price. Upon the death of one tenant the whole continues in the survivor, not by virtue of devise or inheritance, but by virtue of the title that vested at the outset. *Cunningham* v. *Cunningham,* 158 Md. 372, 376, 377; *Ades* v. *Caplin,* 132 Md. 66; *Frey* v. *McGaw,* 127 Md. 23.

The word "inheritance" in Section 204 (a) (5) of the Act, if given its ordinarily accepted meaning, plainly does not include property which vested in a surviving wife not as an heir to her husband, but by reason of the original grant. Petitioner maintains, however, that upon the death of her husband full control of the property passed to her and that her consequently expanded enjoyment of the property partakes of the "quasi-character of inheritance." Thus the petitioner argues that the word "inheritance" was used in a broad sense to include all property which might by any possibility be conceived of as passing by that process. This argument is negatived, we believe, by the second sentence of the subdivision, which discloses that Congress did not intend to use the word in an omnibus fashion. That sentence provides that the provision of the paragraph—

> * * * shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act; * * *

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The subdivisions to which reference is made (see subdivisions (c) and (f), Section 302 of the Revenue Act of 1926 (*infra*, pp. 24, 26)), relate to transfers made in contemplation of or intended to take effect at death and to property passing under a power of appointment. By an argument similar to that now urged by petitioner, it might be contended that property passing by one of those methods should be construed as passing by "bequest, devise, or inheritance"; but since Congress enumerated the interests which it intended to include, in addition to those comprehended by the usual meaning of those words, it seems clear that Congress used the words "bequest, devise, or inheritance" in their technical sense and not broadly.

The interest held as tenants by the entirety is specifically included in the estate of a decedent for estate-tax purposes by subdivision (e) of Section 302 of the Revenue Act of 1926, *infra*, p. 26, just as transfers in contemplation of or intended to take effect at or after death and property passing under power of appointment are included under subdivisions (c) and (f) of the same section, *infra*. But while the latter two are embraced within the exceptions of Section 204(a) (5), estates by the entirety are not included. Under these circumstances the maxim *expressio unius est exclusio alterius*, is clearly applicable.[3] Congress specifically desig-

[3] Further evidence that Congress meant to exclude what was not expressly included in section 204 (a) (5) is found in the treatment accorded to interests transferred in trust with

nated the character of interest to which the standard of fair market value at the date of acquisition by bequest, devise, or inheritance should apply, and carefully omitted estates by the entirety, recognizing no doubt that such estates vest in both spouses in their entirety when created and that the gain after their final disposition is to be based on the capital investment at the time of their creation.[4]

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the reservation of the power to alter, amend, or revoke. Under the Revenue Acts of 1924 and 1926 such interests were included as part of the gross estate of the decedent who made the transfer and reserved the power. (Section 302 (d) of the Revenue Acts of 1924 and 1926.) Under the Revenue Act of 1924, upon a subsequent sale of the property by the trustee, the basis for gain or loss was provided, by specific inclusion of the property in Section 204 (a) (5) of that Act, to be the value at the date of death of the decedent. But the interest was excluded from the operation of Section 204 (a) (5) of the Revenue Act of 1926 by omitting specific reference thereto in that subdivision. The fact that the omission was intended to take the property from the rule applicable to bequest, devise, or inheritance and to require as a basis the value in the hands of the donor, thus taxing the whole of the gain derived, is made apparent by the committee reports on the bill. See H. Rep. No. 1, 69th Cong., 1st Sess., p. 6; S. Rep. No. 52, 69th Cong., 1st Sess., pp. 16–17.

[4] That the failure to include estates by the entirety in the exceptions relating to property acquired by bequest or inheritance was not a *casus omissus* is evidenced by their consistent treatment under earlier Acts. While the Revenue Acts of 1921 and 1924 included in the gross estate of a decedent the interest held as tenants by the entirety as well as those transferred in contemplation of death and by power of appointment (Section 402 (c), (d), and (e) of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 302 (c), (d), and (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253

The Treasury regulations interpreting the statutes defining gain or loss from a sale in connection with property acquired by bequest, devise, or inheritance are in accord with our position and the decision of the court below. In defining such property they have consistently included transfers in contemplation of or intended to take effect at death and property passing by power of appointment, but have omitted estates by the entirety. Regulations 62, Articles 1561, 1563; Regulations 65, Articles 1591, 1594; Regulations 69, Articles 1591, 1594, *infra*, pp. 27–28. The Bureau of Internal Revenue has ruled that the basis to be used in case of sale by the surviving spouse of property held by husband and wife as joint tenants or tenants by the entirety, is the same as if the survivor alone had owned the property from the date of its acquisition by husband and wife. I. T. 1635, II–1 C. B. 19; G. C. M. 6677, VIII–2 C. B. 172. The decisions of the Board of Tax Appeals support that view. Cf. *Boykin* v. *Commissioner*, 16 B. T. A. 477. And see *Carpenter* v. *Commissioner*, 27 B. T. A. 282, which reaches a similar result as to joint tenants under the provisions of Section 113 (a) (5) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 818 (U. S. C.

(U. S. C., Title 26, Sec. 1094)), these Acts as well as the Revenue Act of 1926 have included the latter two interests in the basis prescribed for gain or loss of property acquired by bequest, devise, or inheritance but have omitted estates by the entirety from the class. Section 204 (a) (5) of the Revenue Act of 1921 and Section 204 (a) (5) of the Revenue Act of 1924 (U. S. C., Title 26, Sec. 935).

Sup. V, Title 26, Sec. 2113). The consistent administrative treatment is entitled to great weight, having received legislative approval by the reenactment of the statutory provisions without change.

We submit that the language of Section 204 (a) (5) of the Revenue Act of 1926 may not be construed to establish as a basis for gain or loss on a sale of an estate by the entirety, the market value of any portion of the property at the date of death of one of the tenants. There is no evidence that Congress intended that result; on the contrary, examination of the statute shows a clear legislative purpose to establish as the basis the cost of the property at the date of its acquisition.

As Section 204 (a) contains exceptions to the general provision, the presumption is that Congress stated all the exceptions it intended to state. See *United States* v. *Scharton,* 285 U. S. 518, 521–522; *Bend* v. *Hoyt,* 13 Pet. 263, 272–273. Petitioner has failed to bring this case within any of the enumerated exceptions and the general provision of Section 204 (a) is therefore, as the court below held, applicable.

No decisions of this Court or of any other court are opposed to the conclusion for which we contend. Petitioner has suggested that there is an inconsistency between the view we have urged and the application of the estate tax to property held on a tenancy by the entirety. But we believe that the cases relied on are readily distinguishable.

In *Tyler* v. *United States,* 281 U. S. 497, it was held that, in computing the value of the gross estate of a decedent subject to the estate tax, property held as a tenant by the entirety might constitutionally be included; the tax was upheld as a valid indirect tax measured by the value of the property, rights in which devolved upon the surviving tenant upon the happening of an event, the death of the other tenant by the entirety. In *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160, this Court held that the estate tax was not invalid in a case where the entirety had been created before the enactment of the Act under which it was taxed, but subsequent to the passage of the Revenue Act of 1916, which for the first time adopted a system of death taxes embracing estates by the entirety. In *Third National Bank and Trust Co.* v. *White,* No. 202, October Term, 1932 (decided December 19, 1932), this Court, without opinion other than the citation of the *Tyler case* and *Gwinn* v. *Commissioner,* 287 U. S. 224, affirmed a decision holding valid an estate tax upon an estate by the entirety created before the passage of the Revenue Act of 1916. We submit that these decisions are not in conflict with that of the court below. They do not hold that the survivor acquires any portion of the property by "bequest, devise, or inheritance," nor was it necessary to support the decisions that the property should have been so acquired.

The statute in the *Tyler case* specifically included, for the purposes of the estate tax, the inter-

est held as tenants by the entirety by the decedent and spouse, and this Court indicated that in the absence of a provision to that effect its inclusion would probably not be justified. The tax was sustained both because it tended to prevent evasion of the estate tax and because the event of the tenant's death relieved the property from the restrictions imposed by law upon the rights of the surviving tenant and hence was the generating source of important and definite accessions to the property rights of the survivor. If, as this Court stated, the fact that death was the generating source of such accessions supports the tax, then it follows, as in the *Third National Bank case,* that the tax is validly laid even where the original creation of the estate antedated the first statute which laid a tax thereon at death. But this Court in the *Tyler case* did not indicate that the survivor acquired the property by descent or inheritance. It was carefully shown in the opinion that (p. 503):

> The question here, then, is, not whether there has been, in the strict sense of that word, a " transfer " of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

As was said in *Porter* v. *Commissioner,* decided March 13, 1933, No. 466, October Term, 1932:

> The net estate upon the transfer of which the tax is imposed, is not limited to property that passes from decedent at death.

The same principle was announced in the decision in *Chase National Bank* v. *United States,* 278 U. S. 327, in which it was held that insurance proceeds need not pass directly from the decedent to the survivor in order to support the estate tax. There this Court said in part (p. 337):

> Obviously, the word " transfer " in the statute, or the privilege which may constitutionally be taxed, can not be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another.

It is clear that the death of one tenant did not accomplish a transfer of the property or any part thereof from the decedent to the survivor by descent or inheritance. The limitations upon the survivor's rights caused by the co-equal rights of the other ceased upon that other's death and a corresponding right of sole enjoyment and of disposition of the corpus arose at the same time in the survivor by virtue of death. The petitioner here, as well as her husband, was vested with the property as a whole after the creation of the estate. His death was the

occasion which released the limitations on her property rights, but her powers of sole enjoyment and disposition were not received by inheritance; they resulted from the original grant, followed by the event of death.

We believe that the decision in *Commissioner* v. *Fletcher Savings & Trust Co.*, 59 F. (2d) 508 (C. C. A. 7th), is not opposed to our contention here. That case involved the estate tax and arose under Section 303 (a) (2) of the Revenue Act of 1924 (U. S. C., Title 26, Sec. 1095), providing that in computing the value of the net estate of the decedent there should be deducted "an amount equal to the value of any property * * * forming a part of the gross estate * * * of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest, devise, or inheritance." The question to be decided was whether one-half of the property going to the survivor of a tenancy by the entirety, was received by such survivor from the decedent by "inheritance." In construing the statute involved the court accepted the words broadly and held that the survivor of a tenancy by the entirety did receive the property from the decedent by "inheritance." Even if it be assumed that the correct result was reached in the *Fletcher case*, nevertheless that decision does not conflict with the present case. In that case the court

stated at the outset (p. 509) that "The sole controversy in this appeal arises over the construction of section 303 (a) (2) of the Revenue Act of 1924," a part of the estate tax title of the 1924 Act dealing with one of the authorized deductions for purposes of computing that tax. Here, the Court is concerned with an entirely different provision in the income-tax portion of the revenue laws. It is settled that the same words appearing in different contexts in the same statute need not be construed as having the same meaning. As this Court said in *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433:

> Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.[6]

The considerations affecting the interpretation of the word "inheritance" in the *Fletcher case* and in the instant case are entirely different. In the former the purpose of the provision in which this word appears was to avoid a duplication of the

[6] Compare *Jones* v. *Clifton*, 101 U. S. 225, with *Burnet* v. *Guggenheim*, No. 283, October Term, 1932, decided February 6, 1933; also, *American Security Co.* v. *District of Columbia*, 224 U. S. 491, with *Heald* v. *District of Columbia*, 254 U. S. 20.

estate tax upon the same property within five years; a broad construction of the section to accomplish this purpose may therefore be permissible. See *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 263. But Section 204 (a) (5) of the Revenue Act of 1926, involved in the present case, contains, as we have shown above, stated exceptions to a general revenue provision and should be strictly construed. The construction for which we contend is in keeping with the general policy of Congress to tax income to its full extent. See *Irwin* v. *Gavit*, 268 U. S. 161, 166; Revenue Act of 1926, Section 213 (a), *infra*.

The difference between the price paid by the petitioner and her husband ($13,000) and the amount for which the property was sold by the petitioner ($40,000) represented income which could be taxed. Prior to the time of the sale no part of this gain had been subjected to an income tax. Petitioner was the recipient of the entire increase on the sale; although she did not have an unrestricted right in the property during the whole time that the income accrued, she had a coequal right therein throughout. Under these circumstances the requirement that she should report such increase as income is neither arbitrary nor unreasonable.[7] It accords with the general policy of the law to follow income into the hands of the recipient and tax it there.

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[7] In *Taft* v. *Bowers*, 278 U. S. 470, the tax was sustained even though the seller had no title or rights in the property during a portion of the time that an increase in value accrued.

The result of the construction urged by petitioner would be to free from any tax whatsoever that portion of the profits resulting from the sale by the survivor of an estate by the entirety, representing capital accretions between the date of the creation of the estate and the death of the deceased tenant, in cases where the estate of the decedent does not exceed the amount of the estate tax exemption. In every case of such a sale, moreover, a portion of the appreciated value of the property would escape the income tax. While that result may occur under other but somewhat similar circumstances by express provisions of the statutes, immunity from taxation should not be extended in the absence of specific legislation requiring such a result. See *Pacific Co., Ltd.*, v. *Johnson*, 285 U. S. 480, 491.

Petitioner suggests that the construction for which we contend results in double taxation and argues that an interpretation reaching that result should be avoided. We submit that this contention is without merit. The fact that the market value of a portion of the property corresponding to the amount contributed by the decedent husband is subjected to the estate tax, does not require a construction of the provisions here involved so as to afford exemption from the income tax. The imposition of a tax upon the sale of the property does not result in double taxation merely because an estate tax was levied at an earlier time, though measured by the same property. The two taxes are imposed at different times and upon property

in different hands, they do not fall upon the same interest, and hence no problem of double taxation is presented. Even if the divergent nature of the two taxes and the difference in their incidence is disregarded, multiple taxation of the same subject matter occurring at entirely different times and in different hands, is not objectionable. See *Hellmich* v. *Hellman,* 276 U. S. 233; *Patton* v. *Brady,* 184 U. S. 608; and see *Perthur Holding Corp.* v. *Commissioner,* 61 F. (2d) 785 (C. C. A. 2d), certiorari denied March 13, 1933, No. 666, October Term, 1932. Petitioner suggests that the conclusion for which we contend will single out property held in a tenancy by the entirety while other forms of tenancy will escape the income tax. But certainly joint tenancies and property held in trust subject to the right to revoke by the creator are in the same case. The petitioner urges that tenancies in common would be treated differently, but that is because in such tenancies there is no right of survivorship, and the present problem would not arise.

While in *United States* v. *Supplee-Biddle Co.,* 265 U. S. 189, this Court said that duplication of income and estate taxes upon the proceeds of a life insurance policy was to be avoided unless required by express words, the decision was based on the express terms of the Act there involved. The language of Section 213(b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065, specifically excluded from gross income the proceeds of a life insurance policy paid to individual beneficiaries or to the estate of

the insured. This Court held that a corporate beneficiary, as well as an individual, was entitled to the benefit of this provision by virtue of Section 233(a) of the same Act, which applied to the gross income of corporations the definition prescribed for individuals by Section 213. Here, however, there is no doubt concerning the propriety of the estate tax nor the fact that gains from the sales of property are taxable by virtue of Section 213(a) of the Revenue Act of 1926, while it is equally clear that no excepting provisions of the Act relieves the property here involved from the tax now sought to be imposed.

Nichols v. *United States*, 64 C. Cls. 241, certiorari denied, 277 U. S. 584, does not hold that the inclusion of an interest for the purpose of an estate tax fixes capital value as corpus upon a subsequent sale. In that case a single item, partnership commissions paid to the executor after the death of the decedent, was sought to be treated as a part of the value of the gross estate for estate tax purposes and as part of the gross income for income tax purposes, and the court held that it could not be made to serve in both capacities. In that case there was no difference in taxable entity or in the incidence of the tax and the Government was in effect contending that the same fund was income for one purpose and corpus for another. No such situation is presented here. A portion of the property held on a tenancy by the entirety may be subject to the estate tax upon the death of one of the

tenants. But its value at that time need not represent the basis for gain or loss on a subsequent sale; for the purpose of Congress was to tax the whole of the gain whenever derived upon the sale of the property quite regardless of its valuation at another time and for another purpose as part of the predeceasing tenant's estate.

If there is any seeming hardship here, it results from the fact that the cost of the property was less than its value at the date of the decedent's death. If the value of the property had decreased between the date of purchase and the date of death of one tenant and the sale price was greater than the value at the date of death, the use of the market value at the time of decedent's death as the basis would result in a greater tax. Likewise, where the value at the date of death of the predeceasing tenant is less than cost and the ultimate sale price is still less, the provision will frequently operate to the advantage of the taxpayer, since the same basis is provided by the statute for computing losses as well as gains. The fact that an estate tax has been imposed upon value at time of death cannot influence these fortuitous and divergent results. Where different circumstances produce different results, there is no force to the argument that a certain construction of a statute should be avoided because productive of hardship in some cases. See *Burnet* v. *Guggenheim*, No. 283, October Term, 1932, decided February 6, 1933.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

THOMAS D. THACHER,
Solicitor General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
NORMAN D. KELLER,
Special Assistants to the Attorney General.
WALTER GELLHORN,
Attorney.

MARCH, 1933.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, 14, 23, 70:

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(4) If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition;

(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402 of the Revenue Act of 1921, or in subdivision (c) or (f) of section 302 of the Revenue Act of 1924, or in subdivision (c) or (f) of section 302 of this Act; * * *. (U. S. C. App., Title 26, Sec. 935.)

SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal

service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period. (U. S. C. App., Title 26, Sec. 954.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the

value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relin-

quishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

(e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided*, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further*, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

(f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by

deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *. (U. S. C. App., Title 26, Sec. 1094; U. S. C. Sup. VI, Title 26, Sec. 411.)

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 204 and articles 1592–1602. * * *.

ART. 1594. *Property acquired by gift or transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance.*—In computing the gain or loss from the sale or other disposition of property acquired by gift or by a transfer in trust on or before December 31, 1920, or by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. The term "property acquired by bequest, devise, or inheritance" as used herein includes (except in case of a bona fide sale for an adequate and full consideration in money or money's worth)—

(a) Such property interests as the taxpayer has received as the result of a transfer, or creation of a trust, in contemplation of or intended to take effect in possession or enjoyment at or after death; and

(b) Such property interests as the taxpayer has received as the result of the exercise by a person of a general power of appointment (1) by will or (2) by deed

executed in contemplation of or intended to take effect in possession or enjoyment at or after his death.

In the case of property acquired by gift, bequest, devise, or inheritance, prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 204 (b) and article 1591.

In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 595.—October Term, 1932.

Mrs. Fannie E. Lang, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 10, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

In 1915 petitioner and her husband purchased certain real property at a cost of $13,000, title being vested in them as tenants by the entirety. Of this amount petitioner contributed $1,560 (12 per cent.), and her husband the remaining 88 per cent. The husband died in 1924, the property at that time having a market value of $40,000; and 88 per cent. of that amount was included in the value of the decedent's gross estate for the purposes of the federal estate tax. In 1925 the property was sold for the sum last named. Petitioner, in her income tax return for that year, computed the profit on the basis of the market value of the property at the time of her husband's death, with the exception of 12 per cent., representing the sum which she had contributed to the purchase price of $13,000. The Commissioner determined a deficiency, using the entire 1915 cost as the basis for computing the amount of profit realized. The Commissioner's ruling was affirmed by a decision of the Board of Tax Appeals (12 B. T. A. 854), and that in turn was affirmed by the court below. 61 F. (2d) 280.

The question to be determined, therefore, is whether cost of the property in 1915, or its market value at the time of decedent's death (with allowable deductions), is the proper basis for determining the gain from the sale in 1925.

The solution of the problem depends upon the meaning of the provision contained in § 204 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 14, which reads:

"The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

. . . . .

"(5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition."

An estate by the entirety is held by the husband and wife in single ownership, by a single title. They do not take by moieties, but both and each take the whole estate, that is to say, the entirety. The tenancy results from the common law principle of marital unity; and is said to be *sui generis.* Upon the death of one of the tenants "the survivor does not take as a new acquisition, but under the original limitation, his estate being simply freed from participation by the other; . . ." 1 Washburn, Real Property, 6th Ed., § 912. In the present case, therefore, when the husband died, the wife, in respect of this estate, did not succeed to anything. She simply continued, in virtue of the nature of the tenancy, to possess and own what she already had. Giving the words of the statute their natural and ordinary meaning, as must be done, it is obvious that nothing passed to her by bequest, devise, or inheritance.

The foregoing view is confirmed, if that be necessary, by a consideration of the language immediately following the quotation from paragraph (5), § 204 (a), *supra,* namely, "The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision . . . (c) or (f) of section 302 of this Act." Subdivision (c) deals with transfers by the decedent made in contemplation of or intended to take effect in possession or enjoyment at or after his death; and subdivision (f) has reference to property passing under a general power of appointment, exercised by the decedent by will or deed in like contemplation or with like intention. Ch. 27, 44 Stat. 70-71. The significant circumstance is that subdivision (e), which relates to interests held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, is not included in the enumeration. The result is that the interest held by a joint tenant or tenants by the entirety is expressly included in determining the value of the gross estate for purposes of the estate tax, but not so included as a basis for determining gain or loss under § 204 (a). The express inclusion

of the subdivision in the former case and its omission in the latter persuasively suggests that Congress did not intend to include estates by the entirety under the phrase "by bequest, devise, or inheritance." If Congress did so intend, it is hard to understand why subdivision (e) of § 302 was not expressly adopted as were (e) and (f). Compare *William B. Bend* v. *Jesse Hoyt,* 13 Pet. 263, 272-273.

It is said that the decision of this court in *Tyler* v. *United States,* 281 U. S. 497, requires a different conclusion. But that case does not decide that property held by tenants by the entirety is inherited by the survivor or passes from the dead to the living by right of succession. The decision rests alone upon the fact that Congress had provided in express words (§ 202 (c), Revenue Act of 1916, c. 463, 39 Stat. 756, 777-778) that the value of such property, to the extent designated in subdivision (c), should be included for the purpose of determining the value of the gross estate. And the tax was upheld not upon the theory that there was a "transfer" of the property by the death of decedent, or a receipt of it by right of succession, but upon the ground that death had resulted in such an accession of rights in respect of the control of the property as to make appropriate the imposition of a tax upon that result. In other words, the death of the husband had the effect of freeing the estate from his equal right of participation in its possession, use and disposition, which, while he lived, stood in the way of the wife's exclusive enjoyment of those rights which ordinarily flow from ownership; and this expansion of her power of control, and consequent enlargement of its value, furnished a sufficient occasion for the imposition of an excise tax, which Congress might denominate a death tax, or a transfer tax, or anything else it saw fit, although, in the absence of an expression of the legislative will, it properly could not thus be characterized. *Tyler* v. *United States, supra,* at pp. 502-503.

If the legislation here under review results in imposing an unfair burden upon the taxpayer, the remedy is with Congress and not with the courts. Unless there is a violation of the Constitution, Congress may select the subjects of taxation and tax them differently as it sees fit; and if it does so in plain words, as it has done here, the courts are not at liberty to modify the act by construction in order to avoid special hardship. *Crooks* v. *Harrelson,* 282 U. S. 55, 61.

Judgment affirmed.